United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,277

BEATRICE ANTONETTE TRAMONTANA,

v.

S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE, a Brazilian Corporation, t/a VARIG AIRLINES,

Appeal from the United States District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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STATEMENT OF QUESTIONS PRESENTED

In a suit brought against a Brazilian corporation in the United States District Court for the District of Columbia under 11 D.C. Code §306 (1961 ed.), seeking $250,000 damages for an alleged wrongful death of an American in an airplane collision over Rio de Janeiro, Brazil,

1. Is Article 102 of the Brazilian Code of the Air, limiting recovery for such a wrongful death to $170, so violative of the public policy of the District of Columbia, which permits recovery of substantial damages for wrongful deaths, as to be inapplicable and unenforceable?

2. Does the District of Columbia have sufficient governmental interest and concern in the question as to the amount of recoverable damages in such a suit as to permit application of its own policy allowing recovery of substantial damages?

INDEX

CITATIONS

Cases:

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No. 18,277

BEATRICE ANTONETTE TRAMONTANA,

Appellant,

v.

S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE, a Brazilian Corporation t/a VARIG AIRLINES,

Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant filed a complaint, seeking damages of $250,000, in the District Court below against the appellee S.A. Empresa De Viacao Aerea Rio Grandense, a Brazilian corporation, t/a Varig Airlines. Suit was brought under 11 D.C. Code §306 (1961 ed.), alleging that the negligent acts of the appellee's assignor in interest had caused the death of appellant's husband in Rio de Janeiro, Brazil, on February 25, 1960. Death occurred in the collision of two airplanes, one of them owned and operated by the assignor in interest. As amended, the complaint also

alleged negligent acts in violation of specified provisions of the Brazilian Code of the Air, which recognize a cause of action for such negligence.

The appellee moved for summary judgment in its favor, after filing an answer, "for so much of plaintiff's claim as exceeds the U.S. equivalent of 100,000 cruzeiros, Brazilian currency." The motion was based on Article 102 of the Brazilian Code of the Air, limiting recovery for such negligence to the stated amount.

On October 14, 1963, the District Court entered a judgment in appellant's favor for $170, the current United States equivalent of 100,000 Brazilian cruzeiros. Judgment was then awarded in appellee's favor, as requested, "for all of the plaintiff's claim which exceeds the sum of One Hundred Seventy Dollars ($170.00) herein above awarded to the plaintiff."

Appellant, on November 6, 1963, filed a notice of appeal from the judgment awarded in favor of the appellee. This Court's jurisdiction is invoked under 28 U.S.C. §1291.

STATEMENT OF THE CASE

This case is one of three instituted in the United States District Court for the District of Columbia growing out of a mid-air collision of two airplanes over Rio de Janeiro, Brazil, on February 25, 1960. Eighteen plaintiffs are involved in the three suits. [1]

In all three cases a motion for summary judgment was made by the respective defendants as to so much of the plaintiffs' claims as exceeded the dollar equivalent of one hundred thousand (100,000) cruzeiros in Brazilian currency for each of the deaths for which the several plaintiffs sought damages. Orders granting summary judgment as so prayed were entered in the three proceedings. An appeal was then perfected in the

[1] The instant appeal involves only one of the three suits, Civil Action No. 637-62, brought by one plaintiff, the appellant herein. The other two cases are:
Civil Action No. 592-61, Armiger, et al. v. Real S.A. Transportes Aeros, brought by eleven plaintiffs.
Civil Action No. 600-61, Albrecht, et al. v. Real S.A. Transportes Aeros, brought by six plaintiffs.

instant case, while the other two cases (Nos. 592-61 and 600-61) were ordered "stetted pending final disposition of any appeal taken in the case of Beatrice Antonette Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense, t/a Varig Airlines, Civil Action No. 637-62 in this Court, counsel having stipulated that the final ruling in said case will be controlling herein."

As indicated, the incident giving rise to this three-pronged litigation was the collision of two planes over Rio de Janeiro, Brazil, on February 25, 1960. The two planes were a civilian DC-3 aircraft, owned by Real S. E. Transportes Aeros (a Brazilian corporation t/a Real Airlines), and a United States Navy R6D-1 aircraft (J.A. 6). Included on board the Navy aircraft were eighteen members of the United States Navy Band. All eighteen were killed.

The instant suit was filed in the District Court on February 23, 1962, by the appellant, the widow of one of the aforesaid decedents. She sued in her individual capacity and as the duly appointed and qualified administratrix of the estate of Vincent P. Tramontana, who had been one of the Navy Bandsmen on the Navy aircraft.[2] Appellant was identified in the caption of the amended complaint as residing in West Hyattsville, Maryland (J.A. 1). The named defendants were Real S. A. Transportes Aeros, t/a Real Airlines, and its successor assignee S. A. Empresa De Viacao Aerea Rio Grandense, t/a Varig Airlines. Both defendants were identified as Brazilian corporations with offices in the District of Columbia. (J.A. 1)

The suit was instituted under §306 of Title 11 of the District of Columbia Code[3] and sought judgment for $250,000. It was alleged that the negligent acts of the defendant Real Airlines, in the operations of its

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[2] The various plaintiffs in Civil Action Nos. 592-61 and 600-61 also sued in their individual capacities and as administratrix or executrix of the estates of the deceased passengers; some also sued as the mother and next friend of minor children of the deceased.

[3] Section 306 of Title 11 provides that the District Court shall have cognizance "of all cases in law and equity between parties, both or either of whom shall be resident or be found within said district." See Blake v. Capitol Greyhound Lines, 95 U.S. App. D.C. 334, 222 F. 2d 25.

plane that collided with the Navy aircraft, had caused the death of the said Vincent P. Tramontana in Brazil on or about February 25, 1960

On October 9, 1962, the District Court entered an order — which is not involved in this appeal — quashing service of process upon Real Airlines, leaving as the sole defendant its successor assignee Varig Airlines, the appellee herein. The court at that time also granted leave to the appellant to amend her complaint, on pain of dismissal, by supplying a more definite statement of the specific provisions of the Brazilian Code of the Air or any other provision of Brazilian law on which the appellant relied.

The amended complaint, still naming both Real Airlines and Varig Airlines as defendants, was filed on January 4, 1963 (J.A. 1) alleging negligence with respect to the operation of the plane "in violation of various provisions of the Brazilian law" (J.A. 2). Articles 127, 128, 129, 130 and 132 of the Brazilian Code of the Air, dealing with liability respecting injury or death suffered in mid-air collisions and accidents, were then set forth in full (J.A. 2-3). The amended complaint reiterated (J.A. 1) the original claim that jurisdiction was conferred upon the District Court by §306 of Title 11 of the District of Columbia Code (1961 ed.). On July 3, 1963, the appellee Varig Airlines filed its answer to the amended complaint, denying the allegations of jurisdiction and negligence (J.A. 4).

The appellee Varig Airlines thereupon filed a motion for summary judgment in its favor or, in the alternative, "for summary judgment for the defendant for so much of plaintiff's claim as exceeds the U.S. equivalent of 100,000 cruzeiros, Brazilian currency" (J.A. 5). Attached to the motion were copies of Articles 96, 97, 98, 100 and 102 of the Brazilian Code of the Air, the latter of which provides for a limitation of an air carrier's liability "in the case of physical injury or death to a maximum recovery of one hundred thousand cruzeiros (Cr $100,000.00) for each

person." Other affidavits and exhibits were attached to the motion, including a sworn memorandum by one Paulo Ernesto Tolle purporting to analyze the Brazilian Code of the Air (J.A. 7-35).

On October 14, 1963, following oral argument by counsel and consideration of the written papers, the District Court entered an "Order Granting Summary Judgment" as follows (J.A. 37):

(1) Judgment was entered in favor of the appellant against the appellee Varig Airlines "in the amount of One Hundred Seventy Dollars ($170.00) without costs to either party and . . . execution therefore be had" (J.A. 38). This judgment was premised upon the consent of counsel for Varig Airlines to a judgment in appellant's favor for $170.00, "being the dollar value at current rates of exchange of one hundred thousand (100,000) cruzeiros of Brazilian currency" (J.A. 37).

(2) Judgment was also awarded in favor of the appellee Varig Airlines and against the appellant, without costs, "for all of the plaintiff's claim which exceeds the sum of One Hundred Seventy Dollars ($170.00) herein above awarded to the plaintiff" (J.A. 38).

Appellant, on November 6, 1963, filed a notice of appeal to this Court from this judgment in favor of the appellee Varig Airlines (J.A. 39).

STATUTES INVOLVED

Title 16, §1201, District of Columbia Code (1961 ed.):

> Whenever by an injury done or happening within the limits of the District of Columbia the death of a person shall be caused by the wrongful act, neglect, or default, of any person or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured, or if the person injured be a married woman, have entitled her husband, either separately or by joining with the wife, to maintain an action and recover damages, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the

death of the person injured, even though the death shall have been caused under circumstances which constitute a felony; and such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the spouse and next of kin of such deceased person; and shall also include the reasonable expenses of last illness and burial . . .

Brazilian Code of the Air, published in Diario Oficial of June 27, 1938 (as amended to 1947):

Chapter VIII, Mid-Air Collisions and Accidents.

Article 96 — The provisions relative to the liability of a carrier to third parties, shall embrace any aircraft which operates over Brazilian territory, whether public or private, domestic or foreign.

Article 97 — Any damage caused by an aircraft in flight, while executing takeoff or landing procedures, to individuals or to property on the ground shall give rise to a right of indemnification.

Sole paragraph. Such liability may be reduced or excluded only to the extent that the injured party was at fault.

* * * * *

Article 100 — The following shall be jointly liable for damages referred to in the preceding articles:

a) The person in whose name the aircraft if registered;

b) The person who uses or operates the aircraft;

c) Whoever on board the aircraft caused the damage, except in the case of an intentional act perpetrated by an unknown person upon equipment not in use and which the carrier or his agents were unable to prevent.

Sole paragraph. In any case, the execution of this responsibility shall devolve principally upon the surety established by Articles 103 et sequitur.

* * * * *

Article 102 — The joint liability with respect to each accident shall be limited:

a) in the case of physical injury or death to a maximum recovery of one hundred thousand cruzeiros (Cr $100,000.00) for each person;

b) in the case of damage or destruction of property to a recovery equal to the fair value of the property.

Sole paragraph. The person liable shall not be entitled to benefit by these limits, if the party in interest can prove that the damage was the result of intentional wrongdoing.

* * * * *

Article 127 — A mid-air collision shall be deemed any collision between two or more aircraft in motion.

Sole paragraph. The damages caused by an aircraft in motion to another aircraft also in motion and to persons on board, shall be deemed damages from collision even though they are not the result of a collision.

Article 128 — The indemnification for losses in case of a collision shall attach to the operator of the aircraft at fault.

Article 129 — Whoever has the aircraft within his control and who uses it for his own benefit shall be deemed the operator thereof.

Sole paragraph. In case the name of the operator is not recorded in the Brazilian Registry of Aeronautics, the owner shall be deemed the operator absent proof to the.contrary.

Article 130 — If both of the aircraft in collision be at fault, the liability shall be divided in proportion of the gravity of the errors committed.

Sole paragraph. In the event that it is impossible to establish the proportion, the liability shall be divided equally.

* * * * *

Article 132 — With respect to a serious accident in commercial aviation, the principles of maritime commercial law shall apply, as well as the provisions of maritime law pertinent to that medium, and in that case the aircraft shall be treated as a ship.

Sole paragraph. A minor or special accident shall be controlled by the provisions of the ordinary law.

STATEMENT OF POINTS

1. The court below erred in granting summary judgment for the appellee for so much of appellant's claim as exceeds $170, the current United States equivalent of 100,000 Brazilian cruzeiros.

2. The court below erred in holding applicable the provision of the Brazilian Code of the Air (Article 102) which limits recovery for wrongful deaths in air collisions to 100,000 cruzeiros in Brazilian currency, or $170 in American currency.

3. The court below erred in not ruling that the aforesaid Article 102 of the Brazilian Code of the Air is so violative of the District of Columbia policy respecting recovery of substantial damages for wrongful death as to be inapplicable and unenforceable.

4. The court below erred in not ruling that the District of Columbia has sufficient governmental interest and concern in this case as to the amount of recoverable damages as to permit application of its own policy allowing recovery of substantial damages.

SUMMARY OF ARGUMENT

Simply stated, the question here is whether the appellant is to be restricted to $170, in accordance with Article 102 of the Brazilian Code of the Air, as the maximum recoverable for the wrongful death of her husband in Brazil. The simple answer to that question is that a $170 limitation by American standards is so profoundly unjust, so completely contrary to the whole purpose of allowing recovery for wrongful death losses, as to be violative of the public policy of the District of Columbia

and hence must be considered inapplicable.

But there are several avenues of reaching that answer, avenues which involve consideration of older as well as newer principles relevant to the choice of law to be made in this case:

First. The District Court limited recovery to $170 in reliance upon the traditional lex loci delicti commissi principle — i.e., the right to recover for a foreign tort owes its creation to the law of the place where the injury occurred and depends for its existence and extent solely on that law. Slater v. Mexican National R. Co., 194 U.S. 120. Since Brazil created the cause of action for wrongful death in an air collision in that country, Brazil also controls the extent of damages recoverable for that death. What Brazil has created Brazil can limit.

What the District Court overlooked, however, was an essential and universally acknowledged exception to the lex loci rule. That rule, the Supreme Court has said many times, is "subordinate to and qualified by the doctrine that neither by comity nor by the will of the contracting parties can the public policy of a country be set at naught." The Kensington, 183 U.S. 263, 269. The forum, in other words, is not compelled to recognize or apply any part of a foreign right or limitation which would subvert the forum's view of public policy. Griffin v. McCoach, 313 U.S. 498, 506.

It is that exception which is relevant and controlling in this case. The public policy of the District of Columbia, as expressed in its Wrongful Death Act, 16 D.C. Code §1201 (1961 ed.), is that there shall be no arbitrary maximum placed upon the amount recoverable for a wrongful death. Congress made that policy plain in 1948, when it amended the Act to remove a previously existing $10,000 limitation. See Hord v. National Homeopathic Hospital, 102 F. Supp. 792 (D.C.D.C.), affirmed, 92 U.S. App. D.C. 204, 204 F. 2d 397. Compared with that policy of unlimited recovery, a foreign limit of $170 must be considered absurd and unreasonable.

Confronted with the same problem, the New York Court of Appeals in Kilberg v. Northeast Airlines, 9 N.Y. 2d 39, 172 N.E. 2d 527, considered as "unfair," "anachronistic," "absurd," and "unjust" a Massachusetts limitation of $15,000 on the amount recoverable for a wrongful death; and such a limitation was held to be violative of New York's policy of unlimited recovery. How much more unfair and absurd is a foreign limitation of $170 — not even enough for a decent burial.

Indeed, no American state imposes any limitation even approaching $170. Thirty-seven of the states, like the District of Columbia, impose no limitation whatever. And the remaining thirteen have limitations ranging from $10,000 to $30,000, limitations which are under constant pressure to be removed or at least increased. Even under international air tort standards, epitomized by the Warsaw Convention figure of $8,292 and the more recent Hague Protocol figure of $16,584, a figure of $170 is a mere pittance.

In these circumstances, the Brazilian limitation of $170 must be considered repugnant to the District of Columbia policy of unlimited wrongful death recovery and hence unenforceable.

Second. Even more fundamental an error was the District Court's failure to realize that the lex loci principle upon which it relied is an outmoded and generally discarded theory of choice of law. In recognition of the strong criticism of the lex loci conceptualism, a newer and more realistic judicial approach to this conflicts problem has arisen. It is an approach that says that the law of the place of the tort does not invariably govern the availability or extent of relief for the tort. Instead, the choice of law to be applied to each legal issue presented is to be made in light of the jurisdiction which has the strongest interest in the resolution of that issue.

Beginning with Alaska Packers Association v. Industrial Accident Commission, 294 U.S. 532, and ending most recently with Richards v.

United States, 369 U.S. 1, the Supreme Court has underscored the rejection of the lex loci dogma and has encouraged the state courts to adopt this more realistic approach. The most notable instances of the states' tendency thus to take into account the interests of the jurisdiction having the most significant contact with or interest in the matter at issue have been provided by the New York decisions in Kilberg v. Northeast Airlines, 9 N.Y. 2d 34, 172 N.E. 2d 526, and Babcock v. Jackson, 12 N.Y. 2d 473, 191 N.E. 2d 279. The New York Court of Appeals there abandoned completely the traditional lex loci rule in favor of the newer approach.

Application of the newer concepts to this case involves a weighing and a comparison of the interests of Brazil and the District of Columbia in the determination of the damage recovery issue. Such a weighing and comparison lead inevitably to the conclusion that the District of Columbia, with its unlimited liability policy, has the most direct and substantial concern in this matter. It has a concern with the amount of damages recoverable for the deaths of those who were stationed and who worked in the District; and it has an interest in the welfare of their survivors. The District has a further concern growing out of the fact that the appellee corporation does business in the District and offers air transportation to residents of the District; to promote safety practices by rendering such a corporation liable for the consequences of its negligence, wherever it may have occurred, is to effectuate a strong governmental interest.

In contrast, the interest of Brazil in restricting the damages recoverable against the appellee in an American court is negligible. Any desire Brazil may have to confine an American plaintiff to an amount of damages commensurate with Brazilian living standards is completely impermissible. And any desire it may have to protect the airline industry of Brazil against large damage claims is far outweighed by the availability of airline insurance to protect against such risks. Moreover,

the fact that this accident occurred in Brazil rather than in some other country was a "fortuitous circumstance" which cannot be used as a premise for invoking its policy as to damage recovery.

For these various reasons, therefore, the policy of the District with respect to unlimited or substantial damage recovery for wrongful deaths must prevail in this case.

ARGUMENT

This appeal raises significant questions concerning the choice of law as to the amount of damages recoverable in a District of Columbia action for a wrongful death occurring in a foreign country. Stated in its baldest terms, the basic issue is whether the District of Columbia courts are compelled to recognize and apply a Brazilian damage limitation which, under current rates of exchange, places an upper limit of $170 as the recoverable value of a human life wrongfully taken.

Appellant's position is that even under the traditional conflicts principle of lex loci delicti commissi such an unreasonable limitation is so in conflict with the law and policy of the forum as to be unenforceable in the District of Columbia. Appellant submits further, however, that the time has come for this Court to dispense with any "mechanical formulae of the conflicts of law," Vanston Committee v. Green, 329 U.S. 156, 162. The principle should now be recognized that a District of Columbia court, having jurisdiction over a claim arising out of a foreign tort, has freedom to select "the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented." Babcock v. Jackson, 12 N.Y. 2d 473, 484, 191 N.E. 2d 279, 285; and see Kilberg v. Northeast Airlines, 9 N.Y. 2d 34, 172 N.E. 2d 526.

Indeed, because of the strong international flavor permeating this case, the problem of the choice to be made as to limitation of liability in these circumstances becomes more than a matter of District conflicts law. The balancing of a foreign law limitation against policies

universally recognized in American jurisprudence, particularly in the context of compensating for the death of Americans traveling abroad, raises delicate questions of international comity. As Justice Story once wrote: [4]

> "No nation can be justly required to yield up its own fundamental policy and institutions, in favor of those of another nation. Much less can any nation be required to sacrifice its own interests in favor of another; or to enforce doctrines, which, in a moral, or political view, are incompatible with its own safety, or happiness, or conscientious regard to justice and duty."

The choice that must be made in this case may well partake of such international considerations as to render the choice a federal rather than a local matter. See The Kensington, 183 U.S. 263.

Ultimately, then, it may become the duty of the Supreme Court — as a matter of federal or national comity — "to choose in each case between the competing public policies involved" as between the United States and Brazil. Cf. Hughes v. Fetter, 341 U.S. 609, 611.

I

Under Traditional Conflicts of Law Principles, a Foreign Law Limiting Recovery For a Wrongful Death to $170 is so Contrary to the Public Policy of the District of Columbia and of All the States as To Be Unenforceable.

As a general conflicts principle, it has in the past been held that "when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery." Western Union Tel. Co. v. Brown, 234 U.S. 542, 547. Or, as stated in Slater v. Mexican National R. Co., 194 U.S. 120, 126, "as the only source of this obligation is the law of the place of the act, it follows that that law

[4] Story, Conflict of Laws 35 (3d ed. 1846). And see, generally, Katzenbach, Conflicts On An Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law, 65 Yale L.J. 1087 (1956).

determines, not merely the existence of the obligation . . . but equally determines its extent . . . [it being] unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose." See also 2 Beale, Conflict of Laws 1286-1292 (1935).

This concept, which was relied upon by the District Court below in granting summary judgment in favor of the appellee, has been recognized and applied by this Court. In Giddings v. Zellan, 82 U.S. App. D.C. 92, 93, 160 F. 2d 585, 586, for example, this Court ruled that since the accident and resulting injury in that case occurred in Maryland "in such circumstances the law is well settled that the right of recovery and the amount of damages depend upon the law of that State." See also Rubenstein v. Williams, 61 U.S. App. D.C. 266, 61 F. 2d 575; Paxson v. Davis, 62 U.S. App. D.C. 146, 65 F. 2d 492; Jonathan Woodner Co. v. Mather, 93 U.S. App. D.C. 234, 210 F. 2d 868.

But there has been universal recognition of an exception to this principle of lex loci delicti commissi. As stated by the Supreme Court in The Kensington, 183 U.S. 263, 269, this principle is "subordinate to and qualified by the doctrine that neither by comity nor by the will of the contracting parties can the public policy of a country be set at naught."[5] See also Pacific Employers Ins. Co. v. Industrial Commission, 306 U.S. 493, 504; Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 160. Thus when some otherwise applicable provision of foreign law, be it procedural or substantive, is obnoxious to the public policy of the forum or "violates the strongest moral convictions or appears

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[5] Any other conclusion, said the Court in The Kensington, at 269, is impermissible: "The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it."

profoundly unjust at the forum,"[6] the foreign provision may be and indeed must be ignored. Griffin v. McCoach, 313 U.S. 498, 506.

In short, the law of the forum becomes material "as setting a limit of policy beyond which such [foreign] obligation will not be enforced there." Cuba Railroad Co. v. Crosby, 222 U.S. 473, 478. Where enforcement of such obligation, be it in the form of a cause of action or a limitation of action, would cause us, to use the words of Justice Cardozo, to "feel the pricks of conscience" or would "shock . . . our sense of justice," Loucks v. Standard Oil Co., 224 N.Y. 99, 112, 120 N.E. 198, 202, the limit of the forum's relevant policy has been exceeded.

This "public policy" exception is engrained, of course, in the District conflicts law. The courts of this jurisdiction are designed to "administer the public policy of the District of Columbia," Albert v. McGrath, 107 U.S. App. D.C. 336, 338, 278 F. 2d 16, 18. And when some aspect of that public policy is contravened by a foreign law provision, such provision is deemed inapplicable and unenforceable in the courts of the District. Loughran v. Loughran, 292 U.S. 216, 227; Lewis v. Reconstruction Finance Corporation, 85 U.S. App. D.C. 339, 340, 177 F. 2d 654, 656.

That a foreign limitation of damages with respect to a wrongful death action may be so unreasonable as to contravene the limitations policy of the forum and hence be unenforceable is demonstrated by the recent celebrated case of Kilberg v. Northeast Airlines, 9 N.Y. 2d 39, 172 N.E. 2d 527.[7] There, in an action founded upon the liability created by the Massachusetts Wrongful Death Act, the New York Court of Appeals held that the Massachusetts statutory $15,000 maximum recovery

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[6] Paulsen and Sovern, "Public Policy" In the Conflict of Laws, 56 Colum. L. Rev. 969, 1015 (1956).

[7] The federal constitutional implications of the Kilberg rule were fully explored and resolved in New York's favor in Pearson v. Northeast Airlines, 309 F. 2d 553 (C.A. 2), cert. denied, 372 U.S. 912.

limitation was so contrary to the New York policy of unlimited recovery as to be unenforceable. New York courts, in other words, were held free to award damages in excess of $15,000, where appropriate, in actions stemming from the Massachusetts statute.

Precisely the same type of foreign limitation and the same type of forum policy as were involved in the Kilberg case are present here.[8] Indeed, the disparity in this case between the limitation and the policy is so much greater than in Kilberg as to belie comparison. If a $15,000 limitation was found to be contrary to the New York policy of unlimited recovery, how much more does a $170 limitation cause "the pricks of conscience" to be felt in light of the District of Columbia's policy of unlimited recovery. While no prior District decision has had occasion to compare the policy of the District with inconsistent and totally inadequate limitation provisions of foreign law, the inconsistency and the inadequacy are here so plain as to admit of no conclusion other than one rendering the Brazilian limitation inapplicable to this cause.

The relevant policy of the District of Columbia – indeed, a policy created and imposed by Congress – with respect to limitations on the recovery allowable for wrongful deaths is to be found in the District of Columbia Wrongful Death Act, 16 D.C. Code §1201 (1961 ed.).[9] That statute provides, as to wrongful deaths occurring within the District, a cause of action for an unlimited amount of damages to be assessed with reference to the resulting injury "to the spouse and next of kin of such deceased person; and shall also include the reasonable expenses of last illness and burial."

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[8] The fact that the instant case involves a limitation imposed by a foreign nation, whereas Kilberg involved a limitation of a sister state, is not significant as to matters of the forum's policies. As Justice Cardozo said, "there is nothing sui generis about these death statutes in their relation to the general body of international law. We must apply the same rules that are applicable to other torts." Loucks v. Standard Oil Co., 224 N.Y. 99, 112-113, 120 N.E. 198, 202.

[9] "The only authentic and admissible evidence of the public policy of a state on any given subject are its constitution, laws, and judicial decisions. The public policy of a state, of which courts take notice, and to which they give effect, must be deduced from these sources." Swann v. Swann, 21 Fed. 299, 301 (C.C. Ark.).

The absence of any limitation on the amount of recoverable damages reflects the action of Congress in 1948. At that time the District of Columbia Wrongful Death Act was amended so as to remove the $10,000 limitation theretofore imposed on wrongful death recoveries in the District. The purpose of that change, as Congress made plain (H. Rep. No. 2189, 80th Cong., 2d Sess., 2 U.S. Code Congressional Service, 1948, p. 1878), was "to remove the maximum limitation," while safeguarding "the public interest by granting power to both the trial and appellate court to order reductions in the jury's verdict."

No clearer indication could be had of the District policy respecting wrongful death recoveries. A limitation in terms of $10,000 was obviously thought to be improper; and since 1948 there has been no limitation whatever save that of the good sense of juries and judges. How, then, can it be said that a limitation of recovery to a mere pittance — $170 — is consistent with such unlimited liability?

In Hord v. National Homeopathic Hospital, 102 F. Supp. 792 (D.C. D.C.), affirmed, 92 U.S. App. D.C. 204, 204 F. 2d 397, Judge Holtzoff gave expression to the underlying policy of the District's Wrongful Death Act. In that case, a jury had returned a $17,000 verdict for the death of an infant child, and the defendant hospital asserted that only nominal damages should be allowed in such a situation in addition to the parents' out-of-pocket medical and funeral expenses of $161. In rejecting the hospital's contention, Judge Holtzoff wrote (102 F. Supp. at 794):

> ". . . the general rule is that substantial damages should be awarded in any death case in which the plaintiff prevails, irrespective of the age of the deceased . . . This doctrine is sustained by the weight of authority. It is also the rule in the District of Columbia. In United States Electric Lighting Co. v. Sullivan, 22 App. D.C. 115, 116, in discussing death statutes, the Court stated: 'In numerous . . . cases that might be cited, the . . . liberal rule for the ascertainment of damages to next of kin has been followed as necessary to give any practical effect to the remedial purpose of such legislation.'"

And in further commenting on the substantial nature of damages recoverable for wrongful death in the District of Columbia, Judge Holtzoff noted (102 F. Supp. at 796):

> "In determining what constitutes a reasonable amount of damages the shrinking purchasing power of the dollar must be borne in mind. Juries are properly sensitive to this consideration. A day-to-day observation leads the Court to the view that because of this circumstance the size of verdicts in tort cases has increased considerably in the past few years, and properly so."

In other words, the unlimited liability intention expressed by Congress in amending the Wrongful Death Act in 1948 plus the "substantial damages" concept reflected in the Hord case add up to a policy in the District of Columbia which rejects as unreasonable and obnoxious any foreign law limitation in terms of $170 for a wrongful death. In light of the current purchasing power of the dollar,[10] $170 can hardly be considered the maximum judicial worth of a human life for purposes of a wrongful death action in the District of Columbia courts.

The Supreme Court has said that "Death is the supreme personal injury." American Stevedores v. Porello, 330 U.S. 446, 460. By the same token, death may cause the supreme form of compensable injuries to the spouse and next of kin of the deceased person. Where a wrongful death of a breadwinner is involved, common sense and justice in the American judicial system rebel against any recognition of a foreign damage limitation in de minimis terms. Three years ago this Court held reasonable a $350,000 award to a widow and two children for the wrongful death of an American citizen on board a Dutch airliner that

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10 "Compensation means compensation in value. It will not do to say that the same amount of money affords the same compensation when money is cheap as when money is dear. The value of money lies not in what it is, but in what it will buy. It follows that if $10,000 was fair compensation in value for such injuries as are here involved, twenty years ago, when money was dear and its purchasing power was great, a larger sum will now be required, when money is cheap and its purchasing power is small." Hurst v. Chicago, B. & Q. R. Co., 280 Mo. 566, 573, 219 S.W. 566, 568.

crashed in Ireland. Koninklijke Luchtvaart Maatschappij N.V. KLM v. Tuller, 110 U.S. App. D.C. 282, 292 F. 2d 775. Concrete evidence was thereby given to the District of Columbia policy of unlimited liability — a policy that makes recognition of a $170 limitation both shocking and unreasonable.

The unlimited liability policy of the District of Columbia and of New York with respect to wrongful deaths is in accord with that of the vast majority of American jurisdictions. Of the 50 states of the Union, 37 currently have no limitation on such liability. As to the other 13 states, a recent compilation shows the following (Kreindler, Aviation Accident Law, Vol. 1, §11.01[4], p. 345 [1963]):

> "Thirteen states do have maximum limitations of damages for wrongful death, however, (Colorado — $25,000; Illinois — $30,000; Kansas — $25,000; Maine — $20,000; Massachusetts — $20,000; Minnesota — $25,000; Missouri — $25,000; New Hampshire — $10,000-$25,000; Oregon — $20,000; South Dakota — $20,000; Virginia — $30,000; West Virginia — $20,000; and Wisconsin — $20,000). The number has decreased in recent years, and the limitations have increased. No states limit liability for personal injury."

And the limitations thus imposed in these 13 states have been subjected to growing criticism and efforts to increase the limits or to remove them entirely. No less an authority than the Court of Appeals of New York, in its Kilberg opinion, has labeled such limitations "unfair," "anachronistic," "absurd," and "unjust." As stated by Kreindler, Aviation Accident Law, Vol. 1, §11.01[4], pp. 344-345 (1963):

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[11] Eight states have constitutional prohibitions against limiting recovery for wrongful death — Arizona, Arkansas, Kentucky, New York, Ohio, Oklahoma, Pennsylvania and Utah. Kreindler, Aviation Accident Law, Vol. 1, §13.03[2], p. 396

[12] Kreindler further states (p. 396): "It seems likely that in the coming years the remaining death limitations, both archaic and foreign to our concept of damages, will disappear. In the meantime . . . one would expect more courts to follow Kilberg in refusing to enforce death limitations in other states . . ."

> "The imposition of a maximum limitation of damages represents a departure from ordinary American tort principles. The very essence of our tort law, based as it is upon fault, lies in the concept of the tortfeasor bearing the responsibility and the cost of the damage. Thus, in a simple personal injury accident case, our courts struggle to measure, as precisely as possible, the monetary equivalent of the damage caused, so that the victim may be 'made whole.' Similarly, in wrongful death cases, our law and our courts attempt to measure the precise amount of pecuniary loss sustained by the surviving beneficiaries."

Plainly the policy of American tort law, as reflected in the statutes of the District of Columbia and the various states, is to place no arbitrary limits — or at least relatively high limits — on the amount recoverable in a wrongful death action. It is a policy, even in those few states still maintaining limitations ranging from $10,000 to $30,000, that rejects as unjust and repugnant any foreign limitation translatable into 170 American dollars.

Even under international air tort standards, the $170 limitation is irrational. The Warsaw Convention, to which both the United States and Brazil are signatories, makes the maximum amount recoverable where an aircraft passenger is injured or killed $8,292 in American dollars. And the recent Hague Protocol, as yet not fully ratified, amends the Warsaw Convention by doubling that limitation to $16,584.[13] How can a $170 limitation be considered reasonable in comparison with a $8,292 limit or a $16,584 limit?

It would seem that where, as here, the foreign limitation is so grossly diminutive in American dollars and thus so cruelly inconsistent with even the minimal standards of American and international tort policy the limitation should be ignored without further consideration.

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[13] Kreindler, Aviation Accident Law, Vol. 1, Ch. 12, §§12.01, 12.02, p. 375. The author further states (p. 347) that even these international limitations cause "a huge cost to society and to the individual claimants concerned. How can a widow and several children exist on $8,300. Or $16,600? And what is an injured passenger to do when his hospital bill is $20,000?"

"Rights acquired . . . outside a state are enforced within a state, certainly where its own citizens are concerned, but that principle excepts claimed rights so contrary to the law of the forum as to subvert the forum's view of public policy." Griffin v. McCoach, 313 U.S. 498, 506. The foreign law having recognized a cuase of action and liability, a suit brought in a District of Columbia court or any other American court on that foreign cause of action should then be governed as to damage limitations by the lex fori.

Any other conclusion would create an unfair discrimination against the injured American citizen or domiciliary. What may be considered adequate maximum compensation for a Brazilian citizen living in Brazil who seeks recovery under the Brazilian Code of the Air may become — by the vagaries of the foreign exchange rates and by the entirely different living standards in the United States — quite inadequate payment for an American seeking the same sort of relief.

In these circumstances, an American court would be justified in ignoring a foreign damage limitation that "would be prejudicial to the general interest of our own citizens." See Northern Pacific R. Co. v. Babcock, 154 U.S. 190, 198. Were the Brazilian Code of the Air expressly designed to discriminate in this fashion against American citizens, such a discrimination would obviously be considered contrary to natural justice and the policy of any American forum; hence it would be unenforceable. International law principles would also condemn that type of discrimination. No different result should follow where the unintended but inescapable monetary exchange consequences combine to effectuate discrimination.

Stated differently, there is no indication and no proof that the Brazilian Code of the Air was enacted in order to give a mere token recovery to the spouse or next of kin of a decedent. Nor is there any indication or proof that 100,000 cruzeiros in Brazilian currency would be as inadequate a compensation to a Brazilian citizen as $170 would be to an

American citizen. The only ascertainable fact in this case is that a mathematical translation of 100,000 cruzeiros into American currency yields the $170 figure. As such, the $170 figure becomes a grossly inadequate and unfair limitation in a tort action brought in any American court.

For these reasons, therefore, the $170 limitation imposed by the Brazilian Code of the Air must be considered inimical to the American and international tort policy in general and to the District of Columbia wrongful death action policy in particular. It is a limitation inherently unreasonable and contrary to the District's policy of dispensing equitable compensation to the survivors of those who have been wrongfully killed. On this basis the judgment below should be reversed.

II

Under the Modern Conflicts of Law Principles, the District of Columbia Has a Sufficiently Legitimate Interest in the Application of Its Own Policy as to the Amount of Damages Recoverable in This Case.

As indicated in Part I of this Argument, the public policy exception to the traditional conflicts principle of lex loci delicti commissi abundantly demonstrates the error of the court below in confining appellant's maximum recovery to $170. The public policy of the District makes recognition of such a limitation impermissible.

But this general lex loci principle has been subjected to increasingly devastating criticism by commentators in recent years, criticism which discredits the principle for failing "to take account of underlying policy considerations in evaluating the significance to be ascribed to the circumstance that an act had a foreign situs in determining the rights and liabilities which arise out of that act." Reflecting that criticism, a

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[14] Babcock v. Jackson, 12 N.Y. 2d 473, 478, 191 N.E. 2d 279, 281.
See Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, 26 U. of Chi. L. Rev. 9 (1958); Cavers, A Critique of the Choice-of-Law Problem, 47 Harv. L. Rev. 173 (1933); Cheatham, American Theories of Conflict of Laws: Their Role and Utility, (Continued)

strong judicial trend has now set in which embodies a new and more realistic approach to the choice of law to be applied where more than one jurisdiction has interests in and contacts with a transaction or tort. In contrast with the older lex loci cases, this growing list of precedents recognizes that the forum state has significant freedom in applying its own laws and policies where its own legitimate interests are involved. And it is that line of precedents that should be followed in this case, precedents which underscore the error of the judgment entered below.

One of the earliest statements of this new conflicts methodology was that of Mr. Justice Stone, speaking for the Supreme Court in Alaska Packers Association v. Industrial Accident Commission, 294 U.S. 532, 547-548:

> "Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. It follows that not every statute of another state will override a conflicting statute of the forum by virtue of the full faith and credit clause; that the statute of a state may sometimes override the conflicting statute of another, both at home and abroad; and, again, that the two conflicting statutes may each prevail over the other at home, although given no extraterritorial effect in the state of the other."

Since the present case is one where "the strong unifying principle embodied in the Full Faith and Credit Clause" (Hughes v. Fetter, 341 U.S. 609, 612) is not operative, there is an even greater burden on a party who would require an American court to subordinate its own policies to

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[14] (Continued) 58 Harv. L. Rev. 361 (1945); Yntema, The Hornbook Method and the Conflict of Laws, 37 Yale L. J. 468 (1928); Currie, On the Displacement of of the Law of the Forum, 58 Colum. L. Rev. 964 (1958); Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws, 63 Colum. L. Rev. 1212, 1219-1257 (1963); Morris, The Proper Law of a Tort, 64 Harv. L. Rev. 881 (1951).

that of a foreign jurisdiction — particularly that of a foreign civil law jurisdiction like Brazil.

The Alaska Packers decision was followed in the Supreme Court by Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U.S. 493, 502, where, as later explained in Carroll v. Lanza, 349 U.S. 408, 412, the Court "proceeded on the premise, repeated over and again in the cases, that the Full Faith and Credit Clause does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy." This point was made even more explicit in Watson v. Employers Liability Assurance Corp., 348 U.S. 66, 72:

> "As a consequence of the modern practice of conducting widespread business activities throughout the entire United States, this Court has in a series of cases held that more states than one may seize hold of local activities which are part of multistate transactions and may regulate to protect interests of its own people, even though other phases of the same transactions might justify regulatory legislation in other states."[15]

The Supreme Court's rejection of the dogma that the law of the place of injury must always be followed in tort actions has most recently been made evident in Richards v. United States, 369 U.S. 1. There the Court was confronted with three alternative choice of law rules with respect to an action under the Federal Tort Claims Act[16] where an act of negligence occurred in one state and resulted in an injury and death in another state: "(1) the internal law of the place where the negligence occurred, or (2) the whole law (including choice-of-law rules) of the

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[15] The Second Circuit recently construed this statement from the Watson opinion "as recognizing that a single 'transaction' may contain within itself several distinct 'issues' legitimately made subject to the law of more than one state." Pearson v. Northeast Airlines, 309 F. 2d 553, 560 (C.A. 2).

[16] The Federal Tort Claims Act provides that the Government shall be liable for tortious conduct committed by its employees acting within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b).

place where the negligence occurred, or (3) the internal law of the place where the operative effect of the negligence took place." 369 U.S. at 3.

Under the traditional lex loci theory, there would be no difference between the first two alternatives and the third alternative would be forbidden; the case would then be governed solely by the tort laws of the state where the negligence occurred. But the Supreme Court in the Richards case recognized that there was a vital difference between the first two alternatives and carefully chose the second alternative. A major premise for this choice, as explained by the Court, 369 U.S. at 12-13, was the desirability of providing

> " . . . a degree of flexibility to the law that would not be [otherwise] possible . . . Recently there has been a tendency on the part of some States to depart from the general conflicts rule in order to take into account the interests of the State having significant contact with the parties to the litigation. We can see no compelling reason to saddle the Act with an interpretation that would prevent the federal courts from implementing this policy in choice-of-law rules where the State in which the negligence occurred has adopted it. Should the States continue this rejection of the older rule in those situations where its application might appear inappropriate or inequitable, the flexibility inherent in our interpretation will also be more in step with that judicial approach, as well as with the character of the legislation and with the purpose of the Act considered as a whole."

The Court then went on to restate the free choice that is constitutionally that of the state where the action is brought, 369 U.S. at 15:

> "Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity. Thus, an Oklahoma state court would be free to apply either its own law, the law of the place where the negligence occurred, or the law of Missouri, the law of the place where the injury occurred, to an action brought in its courts and involving this factual situation."

This restatement takes on added significance because the ultimate issue in the Richards case, as in the instant appeal, was the scope of damages recoverable for a wrongful death. Had the traditional lex loci rule been followed, it would have been unthinkable for the Court to apply any rule of damages other than the law of the place where the negligence occurred. Yet that rule was studiously ignored.

Significantly, the Court in the Richards opinion, 369 U.S. at 12, n. 26, cited with approval two state court decisions which applied a rule of local law to govern an incident of a cause of action based upon the law of a foreign state.[17] One of these, Grant v. McAuliffe, 41 Cal. 2d 859, 264 P. 2d 944, held that though the cause of action for personal injuries was based upon Arizona law, the matter of its survival or abatement was of sufficient local concern to be governed by the law of the forum. The other case, Haumschild v. Continental Casualty Co., 7 Wis. 2d 130, 95 N.W. 2d 814, applied the law of the forum and of the parties' domicile as to interspousal immunity with respect to an out-of-state tort.

This "tendency on the part of some States to depart from the general conflicts rule in order to take into account the interests of the State having significant contact with the parties to the litigation," 369 U.S. at 12, has been further implemented by a series of decisions by the New York Court of Appeals. Beginning with Auten v. Auten, 308 N.Y. 155, 124 N.E. 2d 99 (a contracts case), continuing through Kilberg v. Northeast Airlines, 9 N.Y. 2d 34, 172 N.E. 2d 526, and culminating in Babcock v. Jackson, 12 N.Y. 2d 473, 191 N.E. 2d 279, the New York court has abandoned completely the traditional rule that the substantive rights and liabilities arising out of a tortious occurrence in another state must be determined by the law of the place of the tort. Emphasis is placed, rather, upon the law of the place which has the most significant contacts with the matter in dispute.

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[17] The Richards opinion also cited Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W. 2d 365, holding a dram shop in the forum state liable under the forum's law for an out-of-state injury.

Thus in the Kilberg case, the New York court declined to apply the damage limitations law of the place of the tort (Massachusetts) in a death action in New York arising out of an airplane accident; the decedent had been a New York resident and his relationship with the defendant airline originated in New York. Recognizing that the place of injury is entirely fortuitous in this modern day of far-flung air travel, the court emphasized that the merely fortuitous circumstance that the wrong and injury occurred in Massachusetts did not give that state a controlling concern or interest in the amount of tort recovery, as against the competing interest of New York in providing its residents or users of transportation facilities there originating with full compensation for wrongful death.[18]

And in the more recent Babcock decision, the New York court held that a personal injury action could be maintained in New York arising out of an automobile accident in Ontario — a jurisdiction which bars any cause of action in the host-guest type of situation involved. The court there said (12 N.Y. 2d at 482, 191 N.E. 2d at 284):

> "Comparison of the relative 'contacts' and 'interests' of New York and Ontario in this litigation, vis-a-vis the issue here presented, makes it clear that the concern of New York is unquestionably the greater and more direct and that the interest of Ontario is at best minimal. The present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed and undoubtedly insured in New York, in the course of a week-end journey which began and was to end there. In sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there . . . Ontario has no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario by reason of conduct which was tortious under Ontario law."

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[18] New York's constitutional right to make the Kilberg type of choice of limitations law was sustained in Pearson v. Northeast Airlines, 309 F. 2d 553 (C.A.2), a case arising out of the same airplane accident. The Supreme Court denied certiorari. 372 U.S. 912.

It would thus seem clear that the lex loci delicti commissi doctrine has not been incorporated into the fundamental law of the land by virtue of the Full Faith and Credit Clause; nor has it been so incorporated by way of international comity, as Babcock v. Jackson, supra, illustrates. Per contra, the Supreme Court during the past thirty years has given increasing respect to the right of the forum state to make a choice of law that best reflects the legitimate interests of the jurisdiction most concerned with the issue at hand. The doctrinaire principles epitomized in Slater v. Mexican National R. Co., 194 U.S. 120, 126, have indeed been replaced by the flexible, realistic conflicts choice recognized in Richards v. United States, 369 U.S. 1.

As Mr. Justice Black has noted, the choice of law rules grounded upon the lex loci doctrine have been "repudiated by courts and commentators everywhere . . . especially as constitutional rule[s]." Clay v. Sun Insurance Office, 363 U.S. 207, 220 (dissent). The Supreme Court has led the way in rejecting "conceptualistic theories based upon the territoriality of vested rights, adopting instead an approach which looks to the state's governmental interest in the . . . transaction." Zogg v. Penn Mutual Life Insurance Co., 276 F. 2d 861, 865 (C.A. 2).

The trend of conflicts law and the trend of judicial decisions dictate that this case too should be governed by a comparison of the relative "contacts" and "interests" of Brazil and the District of Columbia with respect to the issue of damage limitations. And the first step in that comparison is a recognition of the burden of the appellee "of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state [Brazil] are superior to those of the forum" as regards the limitation of damages. Alaska Packers Association v. Industrial Accident Commission, 294 U.S. 532, 547-548. And see Walton v. Arabian American Oil Co., 233 F. 2d 541 (C.A. 2).

That burden has not been met here. The appellee submitted to the District Court no considerations of Brazilian policy or concern which

would justify the District Court's insistence that the $170 Brazilian limitation be imposed upon this appellant. There was nothing more involved in the District Court's determination than reliance upon the outmoded lex loci principles.

We are thus left to speculate about what possible concern or interest Brazil has in confining an American administratrix, suing in a District of Columbia court, to a recovery of $170 for a wrongful death occurring in Brazil. The nexus between Brazil and the place of the accident is, of course, obvious and does give rise to substantial concern on Brazil's part as to a cause of action, negligence, causation and even damages – at least as to such issues arising in a Brazilian tribunal. But the question here relates to what conceivable interest Brazil has in limiting the damages recoverable in a suit brought in a District of Columbia court. Relative to that question, but two possible concerns come to mind: [19]

(1) A desire to confine a plaintiff to a wrongful death recovery commensurate with the living needs and standards of a Brazilian citizen – a desire which has no relevance to an American plaintiff suing in an American court.

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[19] One authority, Drion, Limitation of Liabilities in International Air Law (The Hague, 1954), has listed eight grounds in justification of the limitation of an air carrier's liability:

1. An analogy with maritime law with its global limitation of the shipowner's liability.
2. The necessity of protecting a financially weak industry.
3. Catastrophic risks should not be borne by aviation alone.
4. The necessity of the carrier or the operator being able to insure against these risks.
5. The possibility that the potential claimants may insure themselves against these risks.
6. The limitation of liability as a counterpart to the aggravated system of liability imposed upon the carrier and the operator.
7. The avoidance of litigation by facilitating quick settlements.
8. The desirability of unification of the law with respect to the amount of damages to be paid.

These eight considerations are criticized by Kreindler, Aviation Accident Law, Vol. 1, §11.01[5], pp. 345-346 (1963), who concludes "that none of them provide a sufficient basis for limiting damages."

(2) A desire to protect the airline industry of Brazil against large damage claims that might be economically disastrous — a desire that is far outweighed by other relevant considerations. Insurance against large damage claims is always available to an airline; and the ability of both domestic and foreign aviation companies to operate successfully in the United States and in other countries, despite the insurable risks of large damage claims, belies any contention that a $170 limitation is a financial necessity.

Moreover, the fact that this accident occurred in Brazil rather than in some other country can be called a "fortuitous circumstance" that should not control the damage recovery issue — particularly as to damages for the death of an individual (like appellant's husband) on board an international flight.[20] So far as the decedent in this case was concerned, the flight from Buenos Aires to Rio de Janeiro might have resulted in his death either in Argentina or Uruguay or over the open sea rather than in Brazil. As stated in Kilberg v. Northeast Airlines, 9 N.Y. 2d 34 at 39, 172 N.E. 2d 526 at 527-528:

> "Modern conditions make it unjust and anomalous to subject the traveling citizen of this State to the varying laws of other States through and over which they move . . . An air traveler from New York may in a flight of a few hours' duration pass through . . . commonwealths [limiting death damage awards]. His plane may meet with disaster in a State he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one State and end in another. The place of injury becomes entirely fortuitous. Our courts should if possible provide protection for our own State's people against unfair and anachronistic treatment of the lawsuits which result from these disasters."

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[20] The record before this Court reveals that the Navy plane, with the decedent aboard, had started its flight in Buenos Aires, Argentina; the Real plane was concluding a flight from Campos, Brazil, which is northeast of Rio de Janeiro. Exhibit 1, pp. 2-3, attached to appellee's motion for summary judgment (not printed in the Joint Appendix).

Thus if chance had decreed death for this individual in some place other than Brazil, the $170 limitation claim would not even be in issue. Only by the "fortuitous circumstance" that the collision occurred in Brazil can the appellee seek to take advantage of the 100,000 cruzeiro provision of the Brazilian Code of the Air. Fortuity is indeed a weak reed to support Brazil's interest in this damage limitation.

Fortuity also marks the situation from the appellee's standpoint. The appellee airline, well known as both a Brazilian and an international carrier, clearly cannot carry with it the 100,000 cruzeiro limitation when it operates outside Brazil; it must, therefore, take other steps to insure itself against large damage claims that might arise from collisions outside Brazil. Brazil, in other words, does not and cannot have an interest in imposing its damage limitation policy in any and all circumstances involving collisions with Brazilian aircraft. And when the circumstances are of the fortuitous nature involved in this case, that Brazilian policy should not be considered binding as a choice of law when a wrongful death action is brought in an American forum. In such circumstances, the forum must be free to apply the damage recovery policy most appropriate to the interests involved. Those interests, in this case, clearly favor the use of the District of Columbia unlimited liability policy.

The District of Columbia's interest in permitting unlimited recovery in this case, in accord with its own established policy, is clear and direct:

(1) At the time of this accident, all of the decedents involved in the three cases filed in the District Court (Nos. 592-61, 600-61 and 637-62; see footnote 1 in Statement of the Case, supra) were members of the United States Navy Band stationed in the District of Columbia, living in and around the District. Some of the surviving spouses and next of kin either resided outside the District or subsequently moved out of the District. The appellant, for example, filed the instant suit (No. 637-62) as an administratrix residing in West Hyattsville, Maryland. Of the other

seventeen plaintiffs in this litigation, three were listed as residents of the District, eight as residents of nearby Maryland communities, and the remainder as residents of other states. One nominal plaintiff in No. 592-61 was appointed by the District Court below as administrator of the estates of four of the deceased individuals.

Thus the District has a very real contact and concern with the amount of damages awardable in these three cases for the wrongful deaths of individuals who were stationed and working in the District. It is a concern which "does not turn on the fortuitous circumstance of the place of their . . . injury." Cf. Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469, 476. The decedents were working domiciliaries in the District. As to them the nexus with the District was complete.

The District's concern with the damages awardable to the surviving spouses and next of kin residing in the District cannot be disputed. The District Wrongful Death Act manifests the District's recognition of the wrong done to the dependents of the deceased and its concern for their future welfare; indeed, if they are left impoverished they may become objects of public charity and welfare. And that same concern is manifested in the action of the District Court below in appointing an administrator to represent in No. 592-61 the estates of four of the decedents.

To the extent that other survivors reside outside the District, no reason suggests itself why the District should, in the circumstances of this litigation, blind itself to their welfare by permitting or requiring a totally inadequate award of damages. All of them were entitled to bring suit in the District under 11 D.C. Code §306 and, with one exception, they reside in states which have, like the District, no limitation on the amount of damages awardable for wrongful death.[21] To

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[21] The one exception is Patricia F. Harl, a plaintiff in No. 600-61; she is listed as residing in Wisconsin, which has a $20,000 limitation. The other non-District plaintiffs are listed as residing in New York, California, North Carolina, Pennsylvania and Maryland — none of which sets a maximum limit of recovery.

discriminate against them with respect to damages awardable for deaths caused by the same accident would be unconscionable. And permitting them to recover amounts in excess of the $170 Brazilian limitation would clearly be in accord with the policies of the states in which they reside. In fact, the $170 limitation is so completely unjust and contrary to the principles of American tort law as to be unenforceable in any American court in which a wrongful death action is properly laid.

(2) The District has a further concern with the amount of damages awardable in this litigation growing out of the fact that the appellee airline is a foreign corporation licensed to do business in the District of Columbia. It has a ticket office in the District of Columbia and offers to all comers, including District residents, to sell tickets for flights on its planes. As a result of this activity, it obviously earns substantial revenue from District and other citizens.

It is not reasonable for the District, in order to protect its citizens from avoidable dangers which may result in the loss of life, to promote safety practices by rendering the appellee airline liable for the consequences of such negligence in the same manner that the District holds airlines liable for negligent acts committed within its borders. One of the principal justifications for tort liability is its expected effect upon the standard of care used in hazardous operations. Holmes, Common Law 44 (1881). And when an airline does business in the District, as appellee does, the District has a real interest in imposing the same substantial tort liability on that foreign corporation as is imposed on domestic corporations.

The sum total arrived at by comparing the respective interests of Brazil and the District of Columbia, with respect to recoverable damages, clearly favors the application of the District unlimited recovery policy and a rejection of the $170 Brazilian limitation. The conclusion thus to be drawn is the same as that drawn by the New York Court of Appeals in Babcock v. Jackson, 12 N.Y. 2d 473 at 484, 191 N.E. 2d 279 at 285:

> " . . . there is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction. Where the issue involves standard of conduct, it is more than likely that it is the law of the place of the tort which will be controlling but the disposition of other issues must turn, as does the issue of the standard of conduct itself, on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented."

In this case, the District of Columbia has "the strongest interest in the resolution of the particular issue presented" – the issue as to the amount of damages awardable for wrongful death.

CONCLUSION

For these various reasons, the judgment below awarding summary judgment to the appellee for all of appellant's claim which exceeds the sum of $170 should be reversed. Whether the public policy exception to the lex loci principle or a comparison of the interests of Brazil and the District be found to be decisive, one important fact remains clear:

> "All the commentators would retain the public policy principle in conflicts to the extent that it is grounded in basic moral conceptions or in ideas of fundamental justice, and we agree. If the foreign law normally applicable violates the strongest moral convictions or appears profoundly unjust at the forum, the law should not be applied. The principle can be defended on the ground that above all, any court's job is to aim at the just accommodation of controversy or, perhaps, with the notion that the decisions of courts should not 'exhibit to the citizens of the state an example pernicious and detestable.' [Greenwood v. Curtis, 6 Mass. 358, 378]." Paulsen and Sovern, "Public Policy" in the Conflict of Laws, 56 Colum. L. Rev. 969, 1015 (1956).

A limitation of $170 for a wrongful death is indeed "profoundly unjust at the forum."

Respectfully submitted,

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February 21, 1964.

JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEATRICE ANTONETTE TRAMONTANA
Individually and as Administratrix of
the Estate of
VINCENT P. TRAMONTANA, Deceased
c/o Mr. Vincent Cozzolino
1613 Dayton Road
West Hyattsville, Maryland

Plaintiff,

v.

REAL S.A. TRANSPORTES AEREOS
a Brazilian corporation t/a
REAL AIRLINES
1509 K Street, N.W.
Washington, D. C.

and its successor assignee

S.A. EMPRESA DE VIACAO AEREA
RIO GRANDENSE
a Brazilian corporation t/a
VARIG AIRLINES
1509 K Street, N.W.
Washington, D. C.

Defendants.

Civil Action
No. 637-62

RELEVANT DOCKET ENTRIES
No. 637-62, Civil

Date	
1962	
Feb. 23	Complaint, appearance. Jury demand.
Feb. 23	Summons, copies (2) and copies (2) of Complaint issued. Both served Feb. 26, 1962.
Apr. 6	Motion of Defendant #1 to quash purported service of process, filed.

Date	
1962	
Apr. 6	Motion of Defendant #2 to dismiss complaint, filed.
May 17	Opposition of plaintiff to motion to dismiss and motion to quash service, filed.
July 26	Order directing plaintiff to file a more definite statement within 20 days. Holtzoff, Judge.
July 27	More definite statement of plaintiff filed.
July 27	Notice of plaintiff to take deposition of Alfredo Lavrinenco, filed.
Aug. 31	Motion of defendant #2 to strike or dismiss complaint, filed.
Sep. 7	Opposition of plaintiff to motion of defendant #2 to strike or dismiss complaint, filed.
Sep. 24	Deposition of Alfredo Lavrinenco, filed.
Oct. 9	Order granting motion of defendant Real S.A. Transportes Aeros to quash purported service of process. McLaughlin, Judge.
Oct. 9	Order granting motion of defendant S.A. Empresa de Viacao Aerea Rio Grandense to strike or dismiss unless plaintiff files within 30 days amended more definite statement. McLaughlin, Judge.
Oct. 31	Order extending time to file amended complaint to January 4, 1963. Walsh, Judge.
1963	
Jan. 3	Amended complaint filed; jury demand.
July 3	Motion of defendant #2 for summary judgment, filed.
July 3	Answer of defendant #2 to amended complaint, filed.
July 8	Statement of material facts, filed.
Aug. 15	Points and authorities of plaintiff in opposition to defendant #2's motion for summary judgment, filed.
Oct. 14	Order granting judgment for plaintiff v. defendant in sum of $170.00 and granting defendant's motion for summary judgment for all of plaintiff's claim exceeding $170.00, without costs. McGarraghy, Judge.
Nov. 6	Notice of appeal by plaintiff, filed.

INDEX

JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEATRICE ANTONETTE TRAMONTANA :
Individually and as Administratrix of
the Estate of :
VINCENT P. TRAMONTANA, Deceased
c/o Mr. Vincent Cozzolino :
1613 Dayton Road
West Hyattsville, Maryland :

Plaintiff :

v. : Civil Action No. 637-62

REAL S.A. TRANSPORTES AEREOS :
a Brazilian corporation t/a
REAL AIRLINES :
1509 K Street, N.W.
Washington, D. C. :

and its successor assignee :
S.A. EMPRESA DE VIACAO AEREA
RIO GRANDENSE :
a Brazilian corporation t/a
VARIG AIRLINES :
1509 K Street, N.W.
Washington, D. C.

Defendants :

[Filed January 3, 1963]

AMENDED COMPLAINT FOR DAMAGES FOR DEATH BY WRONGFUL ACTION

1. Jurisdiction of this cause is conferred upon this Court by Section 306 of Title 11 of the District of Columbia Code, 1961 Edition and by Section 1201 of Title 16 of the District of Columbia Code, 1961 Edition.

2. The plaintiff, Beatrice Antonette Tramontana, is the duly appointed, qualified and acting administratrix of the Estate of Vincent P. Tramontana, who died in Rio de Janeiro, Brazil, on or about February

25, 1960, leaving him surviving his spouse, Beatrice Antonette Tramontana, his son, Carl Tramontana, a minor six years of age, and his daughter, Carol Tramontana, a minor four years of age.

3. The defendant, Real S.A. Transportes Aereos, is a Brazilian corporation trading as Real Airlines, and the defendant, S.A. Empresa De Viacao Aerea Rio Grandense, is a Brazilian corporation trading as Varig Airlines. The defendants are doing business in the District of Columbia. On November 6, 1961, the defendant VARIG filed an application before the Civil Aeronautics Board requesting transfer to it of the permits held by the defendant REAL, and announced on November 17, 1961, that the defendant VARIG had succeeded to the business and properties of REAL by purchasing approximately 95% of the outstanding capital stock of REAL and its affiliated companies; that subsequent to this application and more particularly on January 5, 1962, the President of the United States approved the application of the defendant VARIG so that the defendant VARIG is the successor assignee of the defendant REAL and is doing business in the District of Columbia.

4. On or about February 25, 1960, the decedent above named was a member of the United States Navy and was a passenger on a Naval aircraft which was in mid-air collision with an aircraft owned and operated by the defendants; the mid-air collision aforesaid took place at Rio de Janeiro, Brazil, and was due to the negligent manner in which the defendants operated their aircraft at the time and place aforesaid.

5. The defendants were negligent at the time and place aforesaid in that they were in violation of various provisions of the Brazilian law, as follows:

> Brazilian Code of the Air, published in Diario Oficial of June 27, 1938 (as amended to 1947).
>
> Chapter VIII, Mid-Air Collisions and Accidents. Article 127. A mid-air collision shall be deemed any collision between two or more aircraft in motion.

Sole Paragraph: The damages caused by an aircraft in motion to another aircraft also in motion and to persons on board shall be deemed damages from collision even though they are not the result of a collision.

Article 128. The indemnification for losses in case of a collision shall attach to the operator of the aircraft at fault.

Article 129. Whoever has the aircraft within his control and who uses it for his own benefit shall be deemed the operator thereof.

Sole Paragraph: In case the name of the operator is not recorded in the Brazilian Registry of Aeronautics, the owner shall be deemed the operator absent proof to the contrary.

Article 130. If both of the aircraft in collision be at fault, the liability shall be divided in proportion of the gravity of the errors committed.

Sole Paragraph: In the event that it is impossible to establish the proportion, the liability shall be divided equally.

* * *

Article 132. With respect to a serious accident in commercial aviation, the principles of maritime commercial law shall apply, as well as the provisions of maritime law pertinent to that medium, and in that case the aircraft shall be treated as a ship.

Sole Paragraph: A minor or special accident shall be controlled by the provisions of the ordinary law.

6. As a result of the negligence of the defendants aforesaid, the plane in which the decedent was a passenger was caused to fall, causing the death of the decedent.

WHEREFORE, plaintiff, individually and as administratrix of the Estate of Vincent P. Tramontana, demands judgment against the

defendants in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars, costs and interest.

MEHLER, IVES & SMOLLAR

By /s/

HYMAN SMOLLAR
Attorneys for Plaintiff

* * *

Demand for Jury Trial

Plaintiff demands a trial by jury.

/s/

HYMAN SMOLLAR

[Certificate of Service]

[Filed July 3, 1963]

ANSWER OF DEFENDANT VARIG AIRLINES TO AMENDED COMPLAINT

Comes now the defendant Varig Airlines and, for answer to the Amended Complaint herein, says:

First Defense

The Amended Complaint fails to state a claim against this defendant on which relief can be granted.

Second Defense

1. The allegations of paragraph 1 are denied.

2. The defendant Varig Airlines admits that Vincent P. Tramontana died in Rio de Janeiro, Brazil, on or about February 25, 1960. The defendant is without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 2.

3. The defendant Varig Airlines admits all allegations of paragraph 3 except insofar as it alleges that defendant Real Airlines is doing

business in the District of Columbia, which is denied.

4. Paragraph 4 is denied insofar as it alleges that the collision was due to the negligent manner of operation of an aircraft owned and operated by defendants. The remaining allegations are admitted.

5-6. Paragraphs 5 and 6 are denied.

BOWEN AND RASENBERGER

By /s/
RAYMOND J. RASENBERGER
* * *

JACKSON, GRAY & LASKEY

By /s/
JOHN L. LASKEY
* * *

Attorneys for Defendant, S.A.
Empresa De Viacao Aerea Rio
Grandense

[CERTIFICATE OF SERVICE]

[Filed July 3, 1963]

MOTION OF DEFENDANT VARIG AIRLINES FOR SUMMARY JUDGMENT

Comes now the defendant Varig Airlines and moves this Court for an Order granting summary judgment for the defendant, or in the alternative, for summary judgment for the defendant for so much of plaintiff's claim as exceeds the U. S. equivalent of 100,000 cruzeiros, Brazilian currency, for the reason that there exists no genuine issue of fact, and

the defendant is entitled to judgment as a matter of law. Attached hereto, and made a part hereof, are Affidavits and other relevant exhibits.

BOWEN AND RASENBERGER

By /s/
RAYMOND J. RASENBERGER
* * *

JACKSON, GRAY & LASKEY

By /s/
JOHN L. LASKEY
* * *

Attorneys for Defendant, S.A. Empresa De Viacao Aerea Rio Grandense

[CERTIFICATE OF SERVICE]

[Filed July 3, 1963]

MOTION OF DEFENDANT VARIG AIRLINES FOR SUMMARY JUDGMENT

Statement of Material Facts as to Which No Genuine Issues Exists

On February 25, 1960, a civilian DC-3 aircraft, owned by the defendant, Real Airlines, a Brazilian corporation, while on a flight from Campos, Brazil to Rio de Janeiro, Brazil, collided in the air space above Rio de Janeiro, Brazil, with a U. S. Navy R6D-1 aircraft en route from Buenos Aires, Argentina, to Galeao, Brazil. (Affidavit of Edilio Ramos Figueiredo, pages 2 and 3). Plaintiff's decedent, a passenger on board the U. S. Navy plane, died on the date of the collision as a result of injuries he sustained therein.

JACKSON, GRAY & LASKEY

By: /s/
JOHN L. LASKEY
* * *

BOWEN AND RASENBERGER

By: /s/
RAYMOND J. RASENBERGER
* * *

Attorneys for Defendant

[CERTIFICATE OF SERVICE]

Exhibit No. 2 (Attached to Defendant Varig Airlines Motion for Summary Judgment)

AMERICAN CONSULATE GENERAL
SAO PAULO, S.P., BRAZIL

I, Ernest S. Guaderrama Consul of the United States of America at Sao Paulo, in the State of Sao Paulo, United States of Brazil, duly commissioned and qualified, do hereby certify that

Dr. Aluizio Leao

whose signature and official stamp are respectively subscribed and affixed to this document, was on the 6th day of April, 1962 the day of the date thereof, a Deputy Notary Public at Sao Paulo, in the State of Sao Paulo, United States of Brazil.

In Witness whereof I have hereunto set my hand and affixed the seal of the Consulate General of the United States of America at Sao Paulo, this 9th day of April, 1962.

/s/ Ernest S. Guaderrama
ERNEST S. GUADERRAMA
Consul of the United States
of America

Sao Paulo, Brazil April 9, 1962
Servico No. 650981
Tariff Item No. 48
Fee Paid: U.S. $2.50
Local CY. Equiv. Cr. $800.00

Exhibit No. 2 (Continued)

TRADUCOES
ESCRITORIO "BOLIVAR LACERDA"

* * * * *

TRANSLATION No. 2743/62.C.-

I, the undersigned, sworn public translator and commercial interpreter, before the Board of Trade of Sao Paulo, State of Sao Paulo, Brazil, declare that on this date a document drawn up in Portuguese was presented to me for translation into English, which translation was faithfully done, as shown below: ----------

- 0 -

"COMPENSATION FOR DAMAGES CAUSED BY AIRCRAFT AND THE QUESTION OF CIVIL LIABILITY IN CASE OF AIR COLLISION ACCORDING TO BRAZILIAN LAW".

Paulo Ernesto Tolle

COMPENSATION FOR DAMAGES CAUSED BY AIRCRAFT AND THE QUESTION OF CIVIL LIABILITY IN CASE OF AIR COLLISION ACCORDING TO BRAZILIAN LAW,

Paulo Ernesto Tolle (&)

I

" Whoever violates rights or causes damages to a third party either through wilful acts or omissions, neglect or recklessness, is liable for the compensation of damages.

The establishment of fault and the appraisal of liability are governed by the provisions of this Code, articles 1.518 to 1.532 and 1.537 to 1.553" (1)

(&) Master of Laws, Institute of Air and Space Law, McGill Univ., Montreal; Professor of Aeronautic Law, head of the Administration and Law Department of the Technological Institute of Aeronautics, Sao Jose dos Campos; Juridical Adviser of the Technical Center of Aeronautics; Adviser of the National Committee for Space Activities; 1st Vice-President of the Brazilian Society for Aeronautic Law, Sao Paulo section; corresponding member of the Institute of Aeronautic Law, National University of Cordoba.

(1) Brazilian Civil Code, art. 159.

Exhibit No. 2 (Continued)

liability . ." (9). With special regard to the inventions of the industrial era and to accidents with trains, planes and other vehicles and objects which may cause damages to third parties, a famous specialist asserts that "the vexing question cannot . . . be restricted to the narrow limits of fault." (10)

By accepting in said art. 159 the general principle of liability based on fault, the Brazilian Civil Code itself "adopted a mixed system of extra-contractual liability proclaiming in several articles the obligation of compensation of damages without fault under the influence of the new doctrines and of several provisions of other Civil Codes" (11).

Said influence is also felt in our courts. In a Sentence of the Court of Appeals of Sao Paulo we are reminded of the evolution of the French legislation on accidents caused by vehicles, by the establishment of the presumption of liability: "In accidents caused by cars and other vehicles the fault of the thing is considered, not the person's and thence the presumed liability of the latter." (12)

Alvino Lima emphasizes that the fault presumptions are, in general, created in cases of complex liabilities, that is, those originated from facts of third person or from the fact of inanimate things; and that, once the fault presumptions are established, "the damaging fact is considered in itself a guilty fact and as such will determine the author's liability, unless the latter proves . . . an outside cause for the damage, such as force majeure, fortuitous event, victim's own fault or a fact of third person." (13)

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(9) Alvino Lima, quoted work, p. 16-17.
(10) J. Aguiar Dias, "Da Responsabilidade Civil, vol. II, p. 33, 1950.
(11) Eduardo Espinola, "Breves anotacoes ao Cod. Civil Brasil." Vol. I, p. 454 and next, as quoted by Alvino Lima, work quoted, p. 305-306.
(12) Civil Appeal No. 21 385, plaintiff, Kasu Kitano and defendant Armando Cioffi, concerning a collision of a motorcycle and a truck, in July 1933, in J. M. Carvalho Santos, quoted work, Vol. XXI, p. 451, 1952.
(13) Alvino Lima, quoted work, p. 79.

Exhibit No. 2 (Continued)

The main consequence of an illicit act — any fact not based on the law and causing damage to a third party (2) — "is making its author liable for the compensation of damages." (3)

The illicit act (in which the wrongdoing and quasi-wrongdoing are included) as a general designation "is a whole of which the fault is but one element." (4)

The fault is the "specific element," "the fiat of the other elements which form the illicit act" (5); and the moral imputability is an essential element for the existence of fault (6) which is defined as "a mistake in behavior, to be morally imputed to the agent and which would not be committed by a wiser person in identical "de facto" circumstances" (7)

The classic theory of liability based on fault was, therefore, taken by the Brazilian Civil Code. According to art. 159 thereof only those who by wilful act or omission, neglect or recklessness violate rights or cause damages to another party are obliged to the compensation for damages. "These cases excepted nobody is forced to compensate any eventual damages." (8) -

The subjective liability system of fault proved by the victim suffered, of course, the impact of the new conditions of modern life. "The dangers originated by new inventions heightened by the increasing impossibility, as is often the case, of proving the cause of the accident and the fault of the author of the illicit act, forced the so far sacred and unassailable doors of the theory of fault, when it came to materialize the

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(2) Carvalho de Mendonca, "Doutrina e Prat. Obrigacoes," vol. 2, n. 739, apud J. M. Carvalho Santos, below.
(3) J. M. Carvalho Santos, "Codigo Civil Bras. Coment.", vol. 3, p. 315, 1953.
(4) Alvino Lima, "Culpa e Risco," p. 59, 1960.
(5) Alvino Lima, quoted work, p. 59 & 67.
(6) Alvino Lima, quoted work, p. 70.
(7) Alvino Lima, quoted work, p. 76.
(8) Eurico P. Valle, "Anotacoes ao Cod. Bras. do Ar," p. 96-97, 1942.

Exhibit No. 2 (Continued)

An identical norm is followed in Anglo-Saxon law which resorts to the "Res Ipsa Loquitur" doctrine to this end:

> " It is for the plaintiff to prove that the defendant has been guilty of negligence. Where, however, the plaintiff proves that the thing through, or by means of, which the accident happens was under the control or management of the defendant, and that the accident is such as does not in the ordinary course of things happen without negligence, the burden is thrown on the defendant of proving that the accident was not caused by his negligence; and if he fails either (i) to prove that he was not negligent, or (ii) to give a reasonable explanation of the accident which is at least equally consistent with no negligence as with negligence, the plaintiff is entitled to succeed without giving any further evidence of negligence" (14).

The expression "res ipsa loquitur" absolutely does not correspond to the doctrine of risk and is employed

> ". . . in reference to cases where the mere proof that an accident took place is sufficient under the circumstances to throw the burden upon the defendant of proving that it was not due to his negligence . . . (It) creates an inference of negligence which the jury will be permitted, but not compelled, to accept, whereas the doctrine of strict liability makes the operator liable even though it be proven that he is entirely free from fault or negligence" (15).

In the "O'Hara vs. S.M.T. Co." case, in 1941, in England, Lord Carmont declared:

> " The brocard Res Ipsa Loquitur, as it seems to me, is a mere facet of the law of evidence and one of the exceptions to the leading principle contained in the maxim ei qui affirmat, non ei qui negat, incumbit probatio" (16).

At the trial of the "Sweeney v. Erving" case (1913) by the United States Supreme Court, Justice Pitney said:

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(14) Shawcross and Beaumont "On Air Law," §345, p. 320, 2nd ed. 1951.

(15) A. Adelfio, "Particular aspects of the Rome Convention of 1952", a thesis, Institute of Air and Space Law, McGill Univ.

(16) John Fenston, "Res ipsa loquitur," a thesis, Instit. Air and Space Law, McGill University, 1953.

Exhibit No. 2 (Continued)

> " The general rule in actions of negligence is that the mere proof of an 'accident' . . . does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said res ipsa loquitur — the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence. . ." (16).

The Brazilian Civil Code, as we mentioned before, under the influence of other codes and juridical systems accepted in certain cases the objective theory of liability and in other cases that of presumption of fault. As to the first, articles 1519, 1520, sole paragraph and 1529 (17) are to be indicated as examples; as to the second, articles 1523, 1527, 1528 and 1546 (18).

In Brazilian Law, in addition to the cases referred to, taken from the Civil Code, special laws adopt, for determined activities, the theory of objective liability, in which the absence of fault does not exempt the agent and the mere proof of the nexus of cause confers on the victim the right to compensation. Specific examples thereof are the Labor Accidents Law and the Mining Code. As to the latter, Alvino Lima stresses the exception introduced by this law into the general principle of fault and states: "if the legislator intended to present fault as a basis for liability, he would have stated it expressly or would have referred to the Civil Code" (19).

Other examples of derogation of the general principle of art. 159 of the Civil Code, consecrating the objective theory for certain situations

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(17) Jose de Aguiar Dias, quoted work, vol. I, p. 97.
(18) Jose de Aguiar Dias, quoted work, vol. I, p. 150, note n. 294.
(19) Alvino Lima, quoted work, p. 338.

Exhibit No. 2 (Continued)

and the presumed fault principle for other circumstances, can be found in the Brazilian Air Code.

II

The trends, we have just rapidly noted (observed in the Civil Code and in the special Brazilian legislation) to extend the notion of fault for the acceptance of presumptions of fault and to adopt the theory of risk were taken into account in the working out of the Brazilian Air Code.

Furthermore, the characterization of the civil liability in aviation was influenced by three principal sources when working out that Code:

a) The Warsaw Convention in what regards the contractual liability for the transportation of passengers and things (20);

b) The Rome Convention in regard to the damages caused by aircraft to persons and things on the surface. (21);

c) CITEJA's preliminary drafts for a convention on air collision, in regard to damages originated by collision. (22);

The Warsaw convention adopted the presumption of fault of the carrier. In case of aviation accident with consequent damage to passengers or cargoes it is presumed that the accident was due to the carrier's fault; the victim need not prove the carrier's fault to make the latter responsible; the burden of the proof to exempt him from fault devolves upon him. Evidence in support of the victim's claim must be presented only when the victim alleges that the damage was caused by "dolus" (wilful misconduct) on the carrier's part.

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(20) "Convention for the unification of certain rules concerning international Air Transport," signed in Warsaw on October 12, 1929.

(21) "Convention for the unification of certain rules concerning damages caused by aircraft to third parties on the surface" signed in Rome, May 29, 1933.

(22) Preliminary draft of convention for the unification of certain rules concerning air collision, worked out by CITEJA (Comite International Technique d'Experts Juridiques Aeriens) in 1934 and adopted by the latter in 1936.

Exhibit No. 2 (Continued)

The Rome Convention adopted the objective theory of risk. The compensation for damages to third parties on the surface is owed for the simple fact that the damage exists and that it was originated by the aircraft, independently of inquiries on the existence of fault. The aircraft operator is not exempted from liability even in fortuitous cases. And here also, the victim is supposed to prove "dolus" on the aircraft operator's part.

The preliminary draft of convention on collision, worked out by CITEJA in 1934 did not admit presumptions of fault and took into consideration three different situations: a) collision due to the fault of one of the aircraft which would be held responsible; b) collision due to mutual fault, in which case each aircraft would share the responsibility proportionately, or in case the establishment of the proportion was unworkable, the responsibility would be equally divided; c) collision due to a fortuitous event or to force majeure, in which case there would be no responsibility on the part of the aircraft operators and the victims would bear the damages to persons or things on board (23).

In 1936 CITEJA adopted the project that presented (in regard to the nature of responsibility in cases of collision) two norms, according to the persons damaged:

> ". . . responsabilite subjective, pour les dommages causes soit aux aeronefs entres en collision, soit aux personnes et aux biens qui se trouvent a bord, mais responsabilite objective pour les dommages causes aux tiers a la surface (et, a cet egard, la Convention sur l'abordage aerien sera complementaire de la Convention de Rome)" (24). (x)

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(23) Rafael Gay de Montella, "Principios de Derecho Aeronautico," p. 648-649, 1950.

(24) Raphael Coquoz, Le Droit Prive International Aerien, p. 273,1938.

(x) ". . . subjective responsibility for the damages caused either to the colliding aircraft or to the persons or things on board, but an objective responsibility for the damages caused to third parties on the surface (and, in this matter, the Convention on air collision will complement the Rome Convention)".

Exhibit No. 2 (Continued)

For the compensation of damages caused by aircraft the Warsaw and Rome Conventions established the limitation of responsibility, fixing the maximum compensation owed to the victims, except in case of wilful misconduct.

Following the same orientation the convention project on collisions also provided limits for compensation. "En cas d'abordage la responsabilite de l'exploitant d'un aeronef est toujours limitee," Coquoz informs and next comments: "Par . . . la limitation enfin de la responsabilite de l'exploitant, limitation qui permet de recourir a l'assurance, le projet . . . repond a une necessite et apporte de reels avantages pour la navigation aerienne" (25).

This limitation is characteristic of the preliminary draft (26), forms one of its bases (27) and has been maintained so far in all studies and discussions that aim at the revision of the project and at bringing it up to date (28).

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(25) R. Coquoz, ibidem.

(26) Michel de Juglart, "Traite Elementaire de Droit Aerien," 1952, p. 222: "Mais la caracteristique de l'avant-project, c'est qu'il limite la responsabilite a la valeur de l'aeronef abordeur pour les dommages causes a l'aeronef innocent."

(27) Jonatas Milhomens, "Direito Aeronautico," 1956, p. 245.

(28) In June 1949, the Juridical Committee for the International Civil Aviation Organization (ICAO) asked professor IULL to prepare a draft of a convention on collision. In his proposal, prof. Iull includes the limitation of damage compensation, which only in case of wilful misconduct (dolus) does not prevail or in case of the exploitant's fault when the latter does not prove that the necessary measures had been taken to avoid collision. In the session held by the Juridical Committee of ICAO in Montreal, in September 1960, the following grounds were adopted for the principle of liability: "a) In regard to passengers and cargo on the other aircraft, the Warsaw system would prevail. According to this system the liability depends on the proof of existence of damages and the exploitant may be exempted if he can prove that all the necessary measures to avoid damages had been taken; b) in regard to other damages, the system adopted should be one in which the exploitant would be held liable in case his fault was proved by the plaintiff . . . As to the aspect of limitation of liability, the Committee considered two points: . . . b) the (Continued)

Exhibit No. 2 (Continued)

The reading of the Brazilian Air Code reveals inequivocally that the doctrine of presumed fault (29) according to the Warsaw Convention, was adopted for the carrier's contractual liability; the doctrine of risk (30) according to the Rome Convention for the operator's Achilean (extra-contractual) liability in regard to third parties on the surface, for damages caused by aircraft in motion and the doctrine of fault according to Citeja's preliminary draft for the Achilean liability of the operator of the aircraft at fault (or the operators of the more than one aircraft at fault) in case of collision (31). In the three systems mentioned — according to the conventions and preliminary draft of convention — the Code establishes the limitation of compensation for damages caused by aircraft (32) and further extends said limitation to the compensation for acts of assistance and rescueing (33).

Exceptions to the principle of limitation of compensation in aviation are carefully and expressly mentioned in the Brazilian Air Code:

a) the carrier who accepts a passenger to whom a passage ticket has not been delivered (34); who accepts luggage without the respective

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(28) (Continued) advantage of establishing limits to the carrier's liability in regard to passengers and to property carried on board the other aircraft . . . As to the second point . . . the Committee decided on the acceptance of the Hague limitations in regard to passengers and consignees" (Report of the Brazilian Delegation to the 13th Session of the Juridical Committee of ICAO) — The sub-committee on air collision, of the Juridical Committee of ICAO, which met in Paris, in March 1961, prepared a draft of convention, along the same lines, maintaining the limited liability. (ICAO Bulletin, vol. XVI, No. 4, June 1, 1961).

(29) Arts. 83, 84, 87, 88 and 89.
(30) Arts. 97 and 98.
(31) Arts. 129 and 130.
(32) Arts. 91, 102 and 131.
(33) Art. 124.
(34) Art. 71, sole paragraph.

Exhibit No. 2 (Continued)

note or if the latter does not include certain indications (35); or who accepts merchandise without the respective air consignment note or when the latter does not contain certain particulars (36) — will not have the right to appeal to the provisions in the Code which exclude or limit his liability;

b) The articles of the Code which exclude or limit the liability will be ineffective (40) in case of airplane accidents which cause death or body injuries to the passenger (37), destruction, loss or average to the luggage shipped or to the merchandise (38) as well as in cases of delay in air transportation (39), when the damage is caused by wilful misconduct (dolus) on the carrier's or his agents' part.

c) Persons liable for damages caused to third parties by aircraft (41), or things, or substances falling or projected therefrom (42) cannot take advantage of the limits to liability (43) if the interested party proves they were caused by wilful misconduct (dolus) (44).

d) Damages caused by aircraft on the ground are governed by common law (45);

e) The liability limits provided for in the Code do not prevail for aircraft under Brazilian jurisdiction if the authorities in the nearest airport are not notified in case of collision (46).

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(35) Art. 73, sole paragraph.
(36) Art. 78.
(37) Art. 83.
(38) Art. 84.
(39) Art. 87.
(40) Art. 93.
(41) Art. 97.
(42) Art. 98.
(43) Art. 102.
(44) Art. 102, sole paragraph.
(45) Art. 99.
(46) Art. 131.

Exhibit No. 2 (Continued)

The Air Code thoughtfully and expressly further refers to common civil law or to the maritime legislation, or to other legislations, in the cases specified below:

a) to insure the right of property on the surface, as it is defined by the civil law in what regards the right of flying over private property (47);

b) to make the petitioner of preventive measures without just cause (48) liable for losses and damages according to common civil law;

c) to have the rules of the common civil law observed in the insurance against risks, including the cases of abandonment (49);

d) to have the principles of commercial maritime law and the provisions of mercantile laws regarding that institution applied to gross average in commercial air navigation (and for this purpose the aircraft will be considered on the same footing as a ship) and the provisions of common civil law to plain common average (50);

e) to extend subsidiarily the provisions of common civil law on this subject to air mortgage (51);

f) to stipulate that smuggling shall be punished with a penalty double of that provided for in the respective legislation, when practiced in air transportation; (52)

g) to establish that when infractions against the safety of means of transportation constitute a crime provided for in criminal law, they will be punished according to respective laws (53);

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(47) Art. 61.
(48) Art. 65.
(49) Art. 109.
(50) Art. 132 and sole paragraph.
(51) Art. 146.
(52) Art. 169.
(53) Art. 168.

Exhibit No. 2 (Continued)

h) to provide (when imposing penalties in cases of infraction) that the penalties of the Code will not be in prejudice of those imposed by military, police, fiscal, sanitary or customs laws and regulations (54); and finally,

i) to have the damages caused by aircraft on the ground governed by common civil law as mentioned above (45).

But for the situations mentioned, the Brazilian Air Legislation is governed by the provisions of the Air Code which, as a code, forms a "methodical body of articulate legal provisions to rule a special branch of law" (55); it corresponds to "a complete system of positive law, scientifically arranged and promulgated by legislative authority" (56); it was established by Decree-law 483, of June 8, 1938, which includes among the "whereases" preceding and justifying its articles, the need . . .

> ". . . to endow the country with an adequate legislation which would efficiently govern commercial and civil aviation"

and it has inscribed in its text the provision of art. 2, according to which

> "Air legislation is governed by Conventions and Treaties which Brazil has adhered to or ratified and by the present Code."

In regard to compensation of damages caused by aircraft, the Brazilian Air Code has, therefore, established a special system in which the presumption of the carrier's fault prevails in the transportation contract; the doctrine of risk governs the damages caused to persons or property on the surface; the doctrine of fault prevails for damages caused to third parties in collided-with aircraft; in all cases this special system establishes a limitation of liability, taking in consideration the exceptions provided for in the same Code and which we have already mentioned; this special system was influenced by the international air legislation as well

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(54) Art. 170.
(55) P. Nunes, "Dicionario de Tecnologia Juridica" 1948.
(56) Black, "Law Dictionary," 4th Ed. 1951.

Exhibit No. 2 (Continued)

as by the Brazilian common law itself and thus has broken away from the classic rulings on liability of art. 159 of the Civil Code, making it clear and express that common law or special legislations will be applied to cases originated from the aviation fact, only in the conditions explicitly mentioned in said Air Code.

Therefore, in the Brazilian legislation an aircraft operator – be he the owner, the carrier or the exploitant (57) is liable within limits for whatever damages caused in consequence of flight and the matters of fault and of risk are to be governed by the prescriptions of the Air Code.

The great Master Ambrosini reminds us that

> "es sabido, lippis et tonsoribus, que la preocupacion constante de toto legislador aeronautico de todos los paises, ha sido siempre la de limitar la responsabilidad del explotador o del transportador aereo" (58). (xx)

It is also known that, in the works of CITEJA leading to the conclusion of international conventions and to the preparation of preliminary projects for conventions still not terminated, the limitation of damage compensation was always borne in mind either with the purpose of fostering air navigation by protecting it against damages of incalculable and

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(57) J. C. Sampaio de Lacerda ("Curso de Dir. Comercial Maritimo e Aeronautico," p. 431, 1949) says that "whoever operates the aircraft may not use it for transport but for other purposes to be created or which have been already created through the progress of aviation" and he adds that there's nothing to prevent the figures of the owner, the exploitant and the carrier to be united in one person only. It is, therefore, to be understood that "exploitant" is the wider meaning, including the notion of carrier and, possibly also, that of "owner" under whose name the aircraft is recorded in the Aircraft registry.

(58) Antonio Ambrosini, 'Responsabilidade Contratual-Opinion pro veritate," Rev. Brasil. Dir. Aeron. No. 4, 195a, p. 146, and subsequent ones.

(xx) "it is known, "lippis et tonsoribus", that the constant preoccupation of all aviation legislators in all countries, has always been the limitation of liability of either the air operator (exploitant) or air carrier".

Exhibit No. 2 (Continued)

unforeseeable value or else to make it possible to establish insurance or other liability warranties (59).

In Claudio Ganns's testimony (60), the preliminary project for an Air Code prepared by the 8th legislative sub-committee (61) did not include in its text the regulations of liability for collision and in the project worked out by the Comite Juridique International de l'Aviation — Aviation International Juridical Committee — Brazilian Section, on the initiative of Dr. E. Ribas Carneiro, a provision was included, designed as article 128, according to which:

> "The principles of the commercial maritime law and the provisions of mercantile laws referring to those institutes will be applied to average and collision in commercial air navigation and for this purpose the aircraft will be considered on the same footing as a ship."

whereas in the Senate, the project was amended, its rapporteur Senator Ferreira da Costa having declared:

> "In regard to 'collision' we propose new rules . . . modeled on Dr. Claudio Ganns's subsidies and on the 'avant-projet de la Convention pour l'unification de certaines regles relatives a l'abordage aerienne' . . ."

Thus, Ganns concluded, "the doctrinaire origin of the chapter regarding "air collision" is the preliminary project of "Convention . . . adopted by CITEJA in September 1936."

The aforementioned article 128 of the project for Code was

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(59) Carlos da Silva Costa in a lecture given in 1929, "Aeronautic Law, its present day state," reminds us that since its establishment, CITEJA formed committees for the study of several matters and among other subjects, the one concerning "damages and liability in regard to third parties, including landing, collision and jettison," was attributed to the 3rd committee. In Rev. Brasil. Dir. Aeronautico, No. 6, 1953, p. 79 and subsequent ones.

(60) Claudio Ganns, "Air Collision" opinion, in Rev. Brasileira Direito Aeronautico, No. 5, 1952, p. 38 and subsequent ones.

(61) Established by a Decree of December 6, 1930.

Exhibit No. 2 (Continued)

transformed into art. 132 of the law, wherefrom any references to collision were excluded and according to which the principles of maritime law are to be applied only to gross average.

Therefore, collisions are to be governed by the provisions contained in the Air Code itself.

On this matter, Sampaio de Lacerda (62) mentions the conclusions of the thesis supported by Dr. A. B. Carneiro de Campos at the 2nd National Juridic Congress of 1943 which were unanimously approved, and according to which the carrier's liability is limited as much in regard to persons and things transported and the victimized persons on the surface as in regard to persons and things carried by the collided aircraft.

In our opinion this limitation prevails also, as we stated previously, in regard to any other operator even though not a carrier, in the Brazilian Air Legislation, as well as in other countries' legislation, as we'll try to demonstrate next.

In the already mentioned opinion (see note No. 58) regarding the Superga accident which victimized the football players of Torino Association, when contending Scialoja's (63) opinion which led to the absurd of limiting the compensation of damages caused to the accident victim and to compensate without any limitations the third party which suffered only material damages, Professor Ambrosini asserts that in the Italian Navigation Code the principle of limitation of liability is applied to all cases of damages:

> "no solamente, como dice Scialoja, en los casos sobre danos a los pasajeros y sobre danos a terceros en la superficie sino tambien en aquellos que el Prof. Scialoja no recuerda, sobre danos . . . a consecuencia de choques de aeronaves en vuelo como asimismo en el caso de la deuda del explotador de la aeronave, por asistencia y salvamento . . .

(62) Sampaio de Lacerda, quoted work, p. 459.

(63) Antonio Scialoja, "Responsabilidade Contratual — Opinion pro veritate", Rev. Bras. Dir. Aeronautico, No. 4, 1952, p. 141 and following.

Exhibit No. 2 (Continued)

> (The Code) ha pretendio regular toda la materia y en particular toda la materia de la responsabilidad (a la cual, como hemos dicho muchas veces, se aplica siempre el principio de la limitacion)". (xxx)

We can thus observe the perfect agreement between the Italian and Brazilian legislators' orientation, always influenced by the works of CITEJA.

The study of other legislations in Latin America does not lead to different conclusions.

In Argentina, under Title X — Liability, the Aeronautic Code (64) includes two chapters referred to collision; Chapter IV which deals with damages to persons and to property on board in case of collision; and Chapter V referring to damages to third parties on the surface, in case of collision.

The Argentine Aeronautic Code provides:

> "Art. 160. Si el abordaje es causado por culpa de una de las aeronaves, la responsabilidad por los danos es a su cargo.
>
> No es responsable, si concurren las circunstancias previstas en el articulo 137 (65).

(xxx) "not only, as in Scialoja's opinion, in the cases of damages to passengers and of damages to third parties on the surface but also in these Prof. Scialoja does not quote, of damages . . . in consequence of collision of aircraft in flight as also in the case of debt of the aircraft operator for assistance and rescuing . . . (The Code) intended to govern the whole matter and particularly the whole matter of liability (to which, as we have often stated, the principle of limitation must always be applied.)"

(64) Law No. 14.307, of July 15, 1954.

(65) Art. 137 holds the carrier liable for faults on his agents' part and exempts him in case of proven nautic fault.

Exhibit No. 2 (Continued)

Rigen al respecto, las limitacicnes prescriptas en el articulo 141" (66). (xxxx)

When studying the Argentine legislation (67) we had the opportunity to write:

"The final part of Article 160 is obscure: the aircraft is not liable 'under the circumstances established in Article 137' and then 'the limitations set forth in Article 141 shall prevail'. However, Article 141 considers the case of wilful misconduct . . . Nothing in Article 141 concerns limitations of liability. It is submitted that, if Article 160 aims to extend to cases of collision the limits of liability of Chapter I, it should refer to that chapter, or to Article 139, which fixes the limited sums; and if it intends to prescribe unlimited liability in case of 'dolus', then reference to Article 141 should clearly indicate this purpose."

The mistake was also noted by the Committee in charge of revising the Code. When they presented their project of amendments in October 1957, the wording of art. 160 had been altered and a new provision had been included:

"In the proposed modifications Article 160 is redrafted, and a new article is inserted (Article 162-bis) making it clear that in case of collision the liability is limited" (67).

Art. 164 of the Argentine Aeronautic Legislation states:

"En caso de danos causados a terceros en la superficie, por abordaje de dos o mas aeronaves, los explotadores de estas responden solidariamente a las victimas de los danos, en

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(xxxx) "Art. 160. If the collision is due to the fault of one of the aircraft, the liability for damages is at the latter's account.

The aircraft is not held liable in the circumstances foreseen in article 137 (65).

The limitations prescribed in article 141 will rule in this respect. (66)."

(66) Art. 141 prescribes the exclusion or the limitation of liability in case of wilful misconduct.

(67) P. E. Tolle, "Air Law in Latin America" thesis, 1960.

Exhibit No. 2 (Continued)

los terminos del capitulo precedente" (68). (xxxxx)

An explanatory note follows art. 164:

"La responsabilidad de los explotadores de aeronaves, con respecto a los danos causados a terceros en la superficie, es objectiva y limitada (articulos 149 y 153). Este principio tambien es de aplicacion en los casos en que el dano se ha producido a consecuencia de un abordaje." (i)

In Mexico, the Air Legislation (69) prescribes:

"Art. 354. En los casos de colision de dos o mas aeronaves, los proprietarios o poseedores seran solidariamente responsables por los danos causados a los terceros y a los bienes en la superficie, cada uno dentro de los limites establecidos." (ii)

The more recent Air Code of Paraguay (70) states in Chapter I—"Abordajes aereos" under Title IX (on collisions and averages):

"Art. 133. El operador solamente sera responsable cuando se pruebe que el dano fue causado por culpa suya o de sus dependientes . . ."

"Art. 134. 1. Si los danos son causados por culpa de los operadores de dos o mas aeronaves, cada una de ellas sera responsable para con los otros por los danos por estos sufridos, en la proporcion en que la respectiva gravedad

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(68) The mention of the "aforesaid chapter", made when the draft of Code was being worked out was a mistake also noted by the Revision Committee, as we have commented: "The proposed modifications . . . include a new Article (167-bis) stating that the liability of the operator is limited in accordance with article 152" (see previous note.)

(xxxxx) "In case of damages caused to third parties on the surface by collision of two or more aircraft, the exploitants operators of the latter will be jointly liable before the victims for the damages, according to aforesaid chapter."

(i) "The aircraft operators' liability in regard to damages caused to third parties on the surface is objective and limited (articles 149 to 153). This principle is also to be applied in the cases of damages caused by collision."

(69) Book IV on the Ley de vias generales de communicacion, 27.12.1949.

(ii) "Art. 354. In cases of collision of two or more aircraft, the owners or possessors thereof will be jointly liable for the damages caused to third parties and to the property on the surface, each within the established limits.*

(70) Law No. 469, of September 30, 1957.

Exhibit No. 2 (Continued)

> de sus culpas haya causado los danos. Dicha responsabilidad estara sujeta a los limites mencionados en el articulo 135[2]. . . "
> "Art. 135[2].1. Sin perjuicio de lo dispuesto en el articulo 136 (71), la cuantia de la indemnizacion por los danos reparables . . . no excedera, por aeronave y accidente, de los limites previstos en el articulo 124[2] (72) de este Codigo." (iii)

We see that whereas the Argentine and Mexican legislation do not expressly mention the application of limits — provided for damages caused to third parties on the surface — to the cases of damages caused to third parties on board the collided-with aircraft, the Paraguayan legislation does. This does not imply that the limited liability system, which is a general principle of aeronautic law, does not prevail in such collision cases either in Argentina or in Mexico.

We do not find in compared law, in the sources which influenced the Brazilian Air Code, or in the text of the national aeronautic law any fundamental statement contrary to the proposition we try to support.

The exceptional principle of limitation for the compensation of damages was established, in the Air Code, as a general principle to be

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(71) Art. 136 concerns the non-application of limits in case of wilful misconduct.

(72) Art. 124 establishes the limits of compensation for damages caused to third parties on the surface.

(iii) "Art. 133. The operator will only be responsible when it is proved that the damage was caused by his fault or his agents' . . ." Art. 134.1 If the damages are due to the fault of the operators of two or more aircraft, each of them will be held liable in regard to the others for the damages suffered by them, in proportion to the respective gravity of the faults which caused the damages. Said liability will be restricted to the limits mentioned in article 135 . . ." Art. 135.1 Without prejudice to what is provided for in article 136 (71) the amount of compensation for the damages per aircraft and per accident will not exceed the limits fixed in article 124 (72) of this Code."

Exhibit No. 2 (Continued)

observed even in case of compensation for assistance and rescue work.

The recourse to common civil law and to special legislation is unwarranted but for cases expressly provided for in the Air Code – among which the cases of civil liability are not to be included unless the aircraft is on the ground – inasmuch as the autonomy of the aeronautic law as a special law is universally accepted, constitutionally asserted and expressed in art. 2 of the Code.

Any solution outside the system of limitation of liability adopted by the Code would be illogic, unfair and opposed to the law (73).

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(73) Let's suppose the case of collision between commercial transport aircraft "A" and "B" in which the passengers of "B" proved the fault of "A". Bound to the carrier by a contract, the passengers of "A" would have the right to a limited compensation (Code, arts. 83 and 91) whereas the passengers of "B" (if we were to accept the thesis that limitation does not hold when it concerns the colliding aircraft carrier in relation to the passengers of the collided-with aircraft) would be able to claim total compensation of damages.
Why? – Because of the extracontractual nature of this liability?
But the liability for damages caused by aircraft to third parties on the surface is also an Achillean one and nevertheless, the compensation for such damages is limited. Because the limitation is made legal only through the counterpart of the transfer of the burden of the proof to the agent, in the case of contractual liability? or through the application of the doctrine of risk, for the liability in regard to third parties on the surface?
– This conclusion however is purely theoretical and is not supported either by the norms followed in the Code or in its text which, on the contrary – expressly admits in art. 131 that the colliding aircraft should benefit from the liability limits.
Because the proved fault of aircraft "A" prevents the respective carrier from benefiting from the limitation of liability in regard to the passengers of the collided-with aircraft?
– But it is precisely the crew's fault or a defect of the aircraft that provide the legislator with grounds for holding the carrier responsible – within limits. And the fault is not considered in the case of damages to persons of property on the surface. And only in case of wilful misconduct, or in the circumstances expressly mentioned in the Code, is the operator held liable for full compensation of damages. Now, let us suppose, in the same hypothetical case, that the two aircraft "A" and "B" falling after the collision cause damages to several persons (Continued)

Exhibit No. 2 (Continued)

IV

Art. 103 of the Brazilian Air Code says:

> "The physical or legal person under whose name the aircraft is recorded or under whose name the aircraft is being operated, will guarantee the compensation in the manner and within the limits established in this Code for the personal or material damages the aircraft may eventually cause."

This general provision is to be applied to the owner, to the carrier and to the operator of the aircraft. (74)

The carrier's liability in regard to the passengers and to the cargo aboard his aircraft is provided for in articles 83 and subsequent ones; the operator's liability — be he the owner, the carrier or the exploitant — and also that of a third party on board the aircraft (75) in regard to persons or property on the surface of the ground (76) are to be governed by articles 97 and subsequent ones.

The notion of the operator, as has been said before, includes that of carrier. Carriers whose passengers or shippers suffer damages

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(73) (Continued) on the surface. The latter would receive only limited compensation, while the passengers and the shippers of cargo on the collided-with aircraft "B" would obtain full compensation!

Another example would be that of a commercial transport aircraft "A" collided with during take off manoeuvers, by tourism aircraft "B" performing landing manoeuvers. Damages are caused to the passengers of "A" but also to an airport officer stationed nearby. Once the fault of "B" was proved by the passengers of "A" the latter might claim full compensation from the operator of "B" while the airport officer, as a third party on the surface, would be only entitled to limited compensation!

(74) The person under whose name the aircraft is registered in the Brazilian Aircraft registry (art. 22) is to be considered as owner. The physical or legal person who performs air transport for a profit is to be called the carrier (art. 67); and the person who has the aircraft at his disposal and operates it at his own account is the operator (art. 129).

(75) Art. 100.

(76) Art. 97.

Exhibit No. 2 (Continued)

occurred during the transportation agreed upon have their liability governed by such articles 83 and following. A carrier who causes damages to persons or property on the surface is to be held liable in accordance with articles 97 and following.

Yet, in the chapter on civil liability, section II, under the heading "Liability in regard to third parties", preceding art. 97 concerning the compensation of damages to persons or property on the surface, the Air Code includes article 96, whose transcription might be expedient:

> "The provisions concerning the carrier's liability in regard to third parties will include any aircraft flying over Brazilian territory whether they are government or private, national or foreign ones."

Now, if in other articles, as it has been demonstrated, the Code dealt with the carrier's contractual liability and with his (and other exploitants') Achillean liability in regard to persons or property on the surface, a hurried reading of art. 96 might lead us to imagine its provisions as superfluous — which is not the case, since "verba cum effectu sunt accipienda" (77).

The scope of art. 96, however, is easily understood when compared to the other articles of the chapter on civil liability and to those articles of Chapter VIII, under the same Heading II, which govern air collisions.

In that Chapter, the Code attributes to the exploitant of the faulty aircraft the liability for compensation owed for damages caused in case of collision of aircraft (78). It divides the liability proportionally or in equal parts when the fault is to be attributed in common to the collided

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(77) Carlos Maximiliano, "Hermeneutica e Aplicacao do Direito", p. 311, 6th ed. 1957: "No words are to be considered as useless in Law . . . A value is given to all words and, especially, to all phrases to find the true meaning of a text; the latter must be understood so that all its provisions be effective and that none of its parts become inoperative or superfluous, void or meaningless".

(78) Art. 128.

Exhibit No. 2 (Continued)

aircrafts (79). And it demands that the faulty aircraft under Brazilian jurisdiction notify the collision to have the liability limits provided for in the Code prevailed.

What are these limits?

For the operator (who may also be the carrier) of the fully or partially faulty aircraft in regard to its passengers, and cargo, those of art. 91; for the operator (be he also the carrier or not) in regard to persons or property on the surface, those of art. 102; and, evidently, art. 96 was inserted so that the operator be also liable for damages caused to third parties other than persons or property on the surface, that is, third parties who are persons or owners of property on the not faulty collided aircraft. The carrier responsible for the collision will answer for this third category of damages — (also included in art. 100 (80) — within limits, provided the notification mentioned in art. 131 is made, and within limits in accordance with art. 102.

This has been the opinion of the most distinguished commentators, among which we have the unrefutable explanations of Claudio Ganns:

> "The provisions of art. 131 of the Code are to be understood as especially relating to art. 102. . . In case of collision, the crew and passengers of one of the wrecked aircraft must be, doubtlessly, considered on the same footing as third parties in regard to the other aircraft operator.
> . . . The compensation owed by the responsible operator to passengers and crew of the other aircraft (on the same footing as third parties) is submitted to the limits of art. 102 of the Air Code." (See Note No. 60.)

JUGLART's opinion has the same trend:

> "Il est, en effet, souhaitable, nous l'avons deja dit, de donner aux regles de la responsabilite en cas d'abordage aerien un domain d'application semblable a celui des regles relatives

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(79) Art. 130 and Sole Paragraph.

(80) Art. 100: ". . . will be held as jointly liable for the damages referred to in the aforementioned articles . . ."

Exhibit No. 2 (Continued)

aux dommages causes aux tiers a la surface . . ." (81). (iv)

This trend is also followed by the project of amendment of the Brazilian Air Code, in charge of the Brazilian Society of Aeronautic Law in which the distinguished specialist A. B. Carneiro de Campos includes the article that establishes limits to the compensation owed by the colliding aircraft operator to the persons and things on the collided-with aircraft (82).

The liability for damages caused by collision is evidently to be attributed only to the colliding aircraft, the due compensation devolving upon the respective operator, as per art. 128 of the Code. And, in such case, the burden of the proof of guilt devolves on the third party, (the damaged party) in regard to the other aircraft, inasmuch as the presumption of fault prevails only for the carrier in relation to his own passengers or cargoes, as per articles 83 and subsequent. The doctrine of risk is to be applied only to the same carrier in regard to persons or property on the surface, not included in the transportation contract and in the flight risks incurred by the passengers on the other aircraft.

The aircraft not guilty of any fault proved by the victim has nothing to compensate for. The compensation devolves on the operator of the aircraft whose fault was proved, within limits (83), provided art. 131 is complied with. For the guilty aircraft, the liability in regard to

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(81) Michel de Juglart, quoted work, p. 225.

(iv) "As we have said it is really desirable to give to the rules governing liability in case of collision in flight a range of application similar to that given to the regulations relating to damages caused to third parties on the surface. . ."

(82) Report of Nov. 17, 1961, to the President of the Brazilian Society of Aeronautic Law, Rio de Janeiro.

(83) Art. 128 attributes the obligation for payment of compensation exclusively to the guilty aircraft operator; art. 131 when mentioning the "liability limits" can only refer to the guilty aircraft, as sole responsible.

Exhibit No. 2 (Continued)

passengers and cargo on the not-guilty aircraft is not contractual, nor else "in regard to persons or property on the surface"; it is in relation to third parties, as per art. 96 [illegible word or words] is limited, in accordance with art. 131, and by virtue of art. 102 which completes the section devoted to all cases of liability in regard to third parties whether on the surface or not.

But, finally, even though they accept the limitation of liability for collision when the faulty aircraft is exploited by a carrier these who oppose the views we have tried to prove, refuse to accept it for any other operator who is not a carrier, because art. 96 of the Code refers to the "Carrier's liability".

We do not agree with the argument nor even with the explanation which has been attempted for the wording of art. 96 according to which the word "carrier" has been used there in its general meaning, to include all kinds of aircraft operators.

Art. 96 actually states that for whatever aircraft in traffic in Brazil, whether government owned or private ones, national or foreign and for whatever operator, that is, either the owner, or carrier or exploitant, the provisions concerning the carrier's liability will prevail in regard to third parties.

Art. 96, therefor, contains a general prescription. The provisions concerning the carrier's liability, to prevail for "whatever aircraft" must now be established.

The answer is to be found in art. 96 itself: the provisions concerning liability in regard to third parties.

When these third parties are persons or property on the surface, the carrier is to be held liable (as well as the other operator categories) according to arts. 97 and following. But we still have to make provisions for the case in which the exploitant being any operator of the aircraft it

Exhibit No. 2 (Continued)

causes damages to third parties other than "the persons and property on the surface" – which have already been considered in art. 97. This operator will be held liable (in the same manner as the carrier) for damages caused to these other third parties – who can be only persons and property on board another aircraft or other aircraft damaged in an air collision. Articles 127 to 131 are to rule in this case, the damage to be compensated in the manner provided for in art. 102 and the compensation to be assured according to art. 103, in the manner and within the limits provided for in the Code (84).

In view of the universal evolution of the liability system, of the orientation followed in aeronautic law either internationally or in the legislation of several countries including Brazil in regard to the limitation of compensation for whatever damages are caused by aircraft, of the sources and of the text of Brazilian Air Code we are of the opinion that the latter establishes the limitation of compensation for damages caused by aircraft with the exceptions expressly mentioned in its articles.

Therefore we conclude that in the Brazilian Air Code:

First – The carrier is liable within limits for the damages caused:

a) to passengers or cargo transported, according to the principle of presumed fault, according to articles 83 and following:

b) to persons or property on the surface (third parties on the surface), in accordance to the doctrine of risk, as per arts. 97 and subsequent ones;

c) to third parties – persons or owners of property on another or

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(84) It is important to observe that art. 103 refers to the "personal and material damages the aircraft may eventually cause" including all and whatever damages caused by the aircraft and not only those caused to passengers and cargoes and those inflicted on persons or property "on the surface of the ground".

Exhibit No. 2 (Continued)

other aircraft, in case of collision due to his proved fault, as established in arts. 96, 98, 100, 128 and 131.

Second – The exploitant – be he the owner or the "person under whose name the aircraft is registered"; be he the "person who uses or exploits the aircraft" or "the person at whose disposal the aircraft is and who operates same at his own account" and finally be he "the physical or legal person who performs transport for remuneration" – is to be held liable within limits for the damages caused:

a) to persons or property on the surface of the ground (third parties on the surface) according to the doctrine of risk, as per arts. 97 and subsequent ones.

b) to third parties – persons or owners of property on another or other aircraft – in case the collision is due to his proved fault, as established in articles 96, 98, 100, 128 and 131.

Third – in all cases dealt with in items 1 and 2 above, a guarantee of compensation will be given for the personal or material damages eventually caused by the aircraft in the manner and within the limits established by the Code, according to art. 103.

Fourth – The limitation of liability will not prevail for the carrier only when, in any case, there is wilful misconduct on his or on his agents' part, or when (in the case of letter "a" of item 1 above) he fails to comply with certain formalities concerning the transport documents; or when, (in the case of letter "c" of same item 1) he fails to comply with the provision of art. 131 on the notification of collision, unless the accident has been of public and evident knowledge.

Fifth – the limitation of liability will not prevail for the carrier mentioned in item 2 above, in case of wilful misconduct as well as in the case of collision if he fails to comply with the provision of art. 131 regarding the notification of the accident, unless said accident is of public and evident knowledge.

Exhibit No. 2 (Continued)

Sixth — the compensation in case of collision is only owed by the exploitant of the faulty colliding aircraft or by the exploitants of the faulty colliding aircraft and will take place both in the situation provided for in letter "b" and "c" of item 1 and in the cases dealt with in letters "a" and "b" of item 2, according to art. 102, that is:

a) a maximum of Cr $100,000.00 (one hundred thousand cruzeiros) for each person in case of body injury or death;

b) the total amount of the just value of the property damaged or destroyed.

Sao Jose dos Campos, January 2, 1962

(signed) Paulo Ernesto Tolle
Paulo Ernesto Tolle.

(Certificate of Acknowledgment of Execution of an Instrument issued by the Embassy of the United States of America in the City of Rio de Janeiro, State of Guanabara, United States of Brazil, and signed by Richard D. Scarfo, Vice-Consul)." ___ ___ I, SWORN PUBLIC TRANSLATOR, vouch for the correctness of the above translation and have hereunto set my hand in this Capital of Sao Paulo, this 13th day of February, 1962, A.D. —

/s/

[stamped and written information illegible]

EXHIBIT No. 3 IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Brazilian Code of the Air, Articles 96, 97, 98, 100, 102.

Article 96 — "The provisions relative to the liability of a carrier to third parties, shall embrace any aircraft which operates over Brazilian territory, whether public or private, domestic or foreign."

Article 97 — "Any damage caused by an aircraft in flight, while executing takeoff or landing procedures, to individuals or to property on the ground shall give rise to a right of indemnification.

Sole Paragraph. Such liability may be reduced or excluded only to the extent that the injured party was at fault."

* * *

Article 98 — "Under the same conditions, there shall be indemnification for any damages caused by an object or substance falling from an aircraft, or being thrown from it except in the execution of jettisoning as required by the regulations, or as a result of force majeure."

Article 100 — "The following shall be jointly liable for damages referred to in the preceding articles:

"a) The person in whose name the aircraft is registered;

b) The person who uses or operates the aircraft;

c) Whoever on board the aircraft caused the damage, except in the case of an intentional act perpetrated by an unknown person upon equipment not in use and which the carrier or his agents were unable to prevent.

"Sole paragraph. In any case, the execution of this responsibility shall devolve principally upon the surety established by Articles 103 et sequitur."

Article 102 — "The joint liability with respect to each accident shall be limited:

"a) in the case of physical injury or death to a maximum recovery of one hundred thousand cruzeiros (Cr $100,000.00) for each person;

b) in the case of damage or destruction of property to a recovery equal to the fair value of the property.

"Sole paragraph. The person liable shall not be entitled to benefit by these limits, if the party in interest can prove that the damage was the result of intentional wrongdoing."

* * *

Air Laws and Treaties of the World – An annotated compilation prepared for the Committee on Science and Astronautics, U. S. House of Rep., 87th Congress, 1st Session, May 11, 1961, U. S. Government Printing Office, PP 280-281.

[Filed October 14, 1963]

ORDER GRANTING SUMMARY JUDGMENT

This cause coming on to be heard upon the Motion of the Defendant, S. A. Empresa De Viacao Aerea Rio Grandense, t/a Varig Airlines, for summary judgment, upon the pleadings, affidavits and exhibits filed herein, and the defendant, by its counsel, having consented to a judgment in favor of the plaintiff in the amount of One Hundred and Seventy Dollars ($170.00), being the dollar value at current rates of exchange of one hundred thousand (100,000) cruzeiros of Brazilian currency, and the Court being of the opinion on the basis of the record herein that with said offer of judgment having been made, there is no genuine issue as to any material fact and that the defendant is entitled to a judgment in its favor as a matter of law with respect to any sum claimed by the plaintiff over and above the amount offered in judgment, it is by the Court this 14th day of October, 1963

ORDERED that judgment be entered in favor of the plaintiff against the defendant, S. A. Empresa De Viacao Aerea Rio Grandense, t/a Varig

Airlines, in the amount of One Hundred Seventy Dollars ($170.00) without costs to either party and that execution therefor be had, and it is

FURTHER ORDERED that the defendant's Motion for Summary Judgment be and the same hereby is granted, and judgment is hereby awarded in favor of the defendant and against the plaintiff, without costs, for all of the plaintiff's claim which exceeds the sum of One Hundred Seventy Dollars ($170.00) hereinabove awarded to the plaintiff.

/s/ Joseph C. McGarraghy
Judge

A copy of the foregoing proposed Order served by postage prepaid mail this 9th day of October, 1963 upon Hyman Smollar, Esq., 2000 K St., N.W., Washington 6, D. C., Eugene Gressman, Esq., 1730 K St., N.W., Washington 6, D. C., William Howard Payne, Esq., 1086 National Press Building, Washington 4, D. C., attorneys for plaintiff.

/s/ John L. Laskey
JOHN L. LASKEY

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Beatrice Antonette Tramontana

Plaintiff,

vs. CIVIL NO. 637-62

Real S. A. Transportes Aeros

Defendant.

NOTICE OF APPEAL

Notice is hereby given this 6th day of November, 1963, that plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 14th day of October, 1963 in favor of defendant against said plaintiff.

/s/ Eugene Gressman
Attorney for Plaintiff

1730 K Street, N.W.
Washington 6, D. C.

Serve:

John L. Laskey, Esquire
1025 Connecticut Avenue, N.W.
Washington, D. C., 20036

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,277

BEATRICE ANTONETTE TRAMONTANA,

Appellant,

v.

S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE, a Brazilian Corporation, t/a VARIG AIRLINES,

Appellee.

Appeal From The United States District Court For The District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 13 1964

Nathan J. Paulson
CLERK

HARRY A. BOWEN

1225 - 19th Street, N.W.
Washington, D. C.

JOHN L. LASKEY

1025 Connecticut Ave., N.W.
Washington, D. C.

Attorneys for Appellee

Of Counsel

JACKSON, GRAY & LASKEY

STATEMENT OF QUESTIONS PRESENTED

1. Where the death of appellant's decedent occurred in Brazil in a crash of two planes both in intra-Brazil flights, can appellant, a non-resident administratrix of a non-resident decedent, invoke District of Columbia Law and Public Policy by suing and finding the appellant in the District of Columbia?

2. Do the provisions of Brazilian law fixing maximum damages recoverable preclude a claim for an amount in excess of said maximum where such claim is brought in the District of Columbia courts for a death which occurred in Brazil.

3. Assuming the limitation of the Brazilian Air Code did not apply, would not appellants measure of damage fall under general provisions of Brazilian Law and are not such provisions incapable of application in our courts?

INDEX

CITATIONS

Cases:

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* Cases mainly relied upon indicated by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,277

BEATRICE ANTONETTE TRAMONTANA,

Appellant,

v.

S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE, a Brazilian Corporation, t/a VARIG AIRLINES,

Appellee.

Appeal From The United States District Court
For The District of Columbia

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The case arises out of the collision of two aircraft on February 25, 1960 in the airspace above Rio de Janeiro, Brazil. One aircraft was a United States Navy DC-6 carrying the Navy Band to different cities in South America. The other aircraft was a DC-3 operated by the Brazilian Airline REAL on a regular daily afternoon schedule into Rio. Both aircraft were destroyed, all the passengers and crew of the airline were killed as were all those aboard the Navy aircraft, except for two survivors.

The appellant is a resident of Maryland.[1] REAL operated a ticket office in the District until the reorganization of the international operations of the Brazilian airlines, when its operations into the United States were taken over by Varig, the appellee.

The suits by the band's representatives are the only ones which have been filed as a result of the accident. None have been filed by the United States Navy Department nor against the United States by the representatives of the passengers in the airliner or by REAL.

The appeal is from the District Court's ruling in the Tramontana case on the basis of an offer by appellee of judgment in that case only. In the other cases, the judgment entered dismissed so much of the plaintiff's claims as exceeded the dollar equivalent of 100,000 crugeiros. (In those cases no offer of judgment was made, and no admission of liability has been made in this or in the other cases).

STATUTES AND TREATIES INVOLVED

1. Air Transport Agreement between the United States of America and the United States of Brazil of 1946, 61 Stat. 4121.

2. Brazilian Aeronautical Code, Articles 96, 97, 100 and 102.

3. Brazilian Civil Code, Article 1537.

4. District of Columbia Code, Title 11, Sections 306 and 755, and Title 16, Section 1201 (1961 Ed.).

5. Federal Aviation Act of 1958, Section 1102, 49 U.S.C.A., Section 1502.

6. International Civil Aviation Conference Convention on International Civil Aviation ("Chicago Convention") of 1944, 61 Stat. 1180.

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[1] Of the eighteen plaintiffs below, only two are from the District, the others are located in seven states.

7. Law of Introduction to the Brazilian Civil Code, Article 9.

8. "Warsaw Convention" of 1929, 49 Stat. 3000.

SUMMARY OF ARGUMENT

The District Court correctly applied the law. It held the law of Brazil controlling.

The significant facts occurred in Brazil – the accident, the deaths of all the passengers on the airliner as well as most of those on board the Navy plane, the local travel by the Brazilian airliner, the travel of the United States Navy aircraft, the inquiry into the accident, the witnesses, the rules and regulations governing the flight all took place or are in Brazil. For the convenience of appellant, the matter can be tried in the United States but the law applicable is that of Brazil.

The appellant requests the Court to rewrite the law of Brazil which is an outgrowth of a legal system substantially differing from ours. A much different question is presented than the application of laws which are different in the various states.

Cases involving accidents on ships and other international cases have followed the law of the place of injury on the theory that otherwise transportation companies would be subject to unknown and differing laws.

Appellant claims that a recent case in New York is leading the way to a new approach to limitation of liability laws. But this case has not been followed by recent cases in Pennsylvania and in the First and Sixth Circuits. Nor does the case involve an international question. Insofar as public policy is relevant to this case, it requires the affirmance of the District Court. To grant appellant's request would subject the representatives of the victims of the same accident to vastly different recoveries.

ARGUMENT

I.

The District of Columbia Wrongful Death Act, Title 16, Section 1201, District of Columbia Code (1961 Ed.), Is Inapplicable Either in Whole or in Any Part to Plaintiff's Claim Because Congress Did Not Intend It to Be Given Application to a Cause of Action Arising Extra-Territorially

The District of Columbia Wrongful Death Act is, by express language, applicable only to "an injury done or happening within the limits of the District of Columbia" which causes death. The necessary implication of inapplicability to injuries done or happening without the District was declared in Lewis v. Reconstruction Finance Corp., 85 U.S. App. D.C. 339, 177 F.2d 654 (1949), holding that a two-year limitation under the Nebraska Wrongful Death Statute would control as against the one-year D. C. limitation (Title 16, Sec. 1202, District of Columbia Code (1961 Ed.)) in determining whether a claim for fatal injuries suffered in Nebraska had expired. The Court said, per Procter, J., "Our Wrongful Death Statute, and the limitations thereof are confined to deaths resulting from injuries suffered within the District of Columbia . . . the narrow scope of the law precludes its application in any part to a case where the fatal injuries occurred outside the District." 85 U.S. App. D.C. 341, 177 F.2d 656.

It is, of course, fundamental that an action for damages for wrongful death is statutory in origin and does not derive from the common law. Consequently, the District of Columbia Wrongful Death Statute could be the only source of an obligation to recompense appellant for the death of her decedent originating in District of Columbia law. Since the reach of the Statute is territorially limited, appellee's obligation must be measured by a standard other than that of the D. C. Act, and Title 16, Sec. 1201, therefore, confers no jurisdiction of the claim upon this Court or the lower Court.

II.

The Brazilian Aeronautical Code, Article 102, Limits Plaintiff's Maximum Recovery to a Sum Which Has Been Awarded and Is Intended by the Brazilian Legislative Authority to Govern Exclusively the Amount of Any Damages to Which Appellant Might Be Entitled

It is axiomatic that lex loci delicti is the source of a defendant's obligation to compensate the plaintiff for injuries of a tortious nature; it is hardly less fundamental that the obligation may be limited by the same law and must be, as so limited, enforced wherever suit is brought. Goodrich, Conflict of Laws, Sec. 105; Restatement, Conflict of Laws, Sec. 412. An action for wrongful death, being no part of the common law of a common law jurisdiction, is entirely dependent upon the law of the place of injury, both as to its existence and its extent. Goodrich, supra, Secs. 102, 105; Restatement, supra, Sec. 393. The rules of Conflict of Laws, however, are elements of the common law of the State and are binding upon the forum; Restatement, supra, Sec. 5. The rule applicable in the District of Columbia has been stated in Slater v. Mexican National Railroad Co., 194 U.S. 120, 48 L. Ed. 900 (1904), as a matter of general Federal law governing actions upon foreign death statutes. Slater, a resident of Texas, died from injuries sustained in Mexico in the course of employment by reason of defendant's negligence. The defendant was a Colorado corporation. The United States District Court in Texas instructed the jury to measure damages in accordance with the Texas statute. In reversing a verdict for plaintiff, Slater's widow, the Court said, per Holmes, J.:

> "It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose . . . Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the

> defendant may happen to be caught . . . as the cause of action relied upon is one which is supposed to have arisen in Mexico, under Mexican laws, the place of the death and the domicile of the parties have no bearing upon the case." 194 U.S. at 126-127, 48 L. Ed. at 903.

The principle of Slater was reaffirmed by the holding in Cuba Railroad Co. v. Crosby, 222 U.S. 473, 56 L. Ed. 274 (1912), and more recently, by dicta in majority opinions in Black Diamond Steamship Corp. v. Stewart, 336 U.S. at 396, 93 L. Ed. at 763 (1949), and in Lauritzen v. Larsen, 345 U.S. at 583, 97 L. Ed. at 1268 (1953). It has been followed by the Court of Appeals for the District of Columbia in Giddings v. Zellan, 82 U.S. App. D.C. 92, 160 F.2d 585 (1947), cert. denied, 332 U.S. 759, 92 L. Ed. 345, in applying the Wrongful Death Statute of a sister State; the Court of Appeals for the Fifth Circuit expressly followed Slater in applying the Wrongful Death Statute of a foreign nation to residents of a Federal enclave, the Panama Canal Zone, in Liechti v. Roche, 198 F.2d 174 (1952). Each court declared, as a rule of the forum, that, in an action for wrongful death arising upon injuries sustained in foreign territory, the measure of damages as well as the right of recovery must be determined exclusively with reference to the law of the foreign territory. The rule was, by necessary implication, recognized as the law of the District of Columbia by this Court in Union Trust Co. v. Eastern Airlines, 113 F. Supp. 80 (1953), McGuire, J., in which the issue of the situs of a mid-air collision of aircraft was held to have been properly resolved upon the evidence by the jury in determining whether the District of Columbia or the Virginia Wrongful Death Statute should apply in assessing the amount of recovery. Defendant submits that, therefore, the question of whether the measure of damages for wrongful death may be characterized as "procedural", and thus subject to local variation, is not open in this jurisdiction, and that, in accordance with the general rule of Slater, any recovery to which plaintiff may be entitled must be assessed by the law of Brazil unless contrary to the public policy of the District of Columbia.

The Chicago Convention of 1944, Articles 1 and 2, established in accordance with the "universally recognized doctrine of international law" that Brazil exercises "complete and exclusive sovereignty" over the air space above its territory and territorial waters. Dicey, Conflict of Laws, Rule 181; 61 Stat. at 1180. An aircraft within Brazilian air space is, therefore, subject to Brazilian territorial jurisdiction, including Brazilian legislation. The Brazilian Aeronautical Code, Article 96, declares that its liability provisions with respect to liability of a "carrier" to "third parties" shall encompass any aircraft operating over Brazilian territory, whether public or private, domestic or foreign. Article 102 declares that liability to such "third parties" shall be limited in amount to a maximum of 100,000 cruzeiros per person in cases of bodily injury or death, except in specified exceptional circumstances not alleged by plaintiff to exist here. And "third parties" is, in accordance with the intent of the Brazilian legislative authority, construed to include persons on board other aircraft colliding in mid-air with an aircraft for which the defendant is responsible (Affidavit of Paulo Ernesto Tolle, JA 8-35). One hundred thousand Brazilian cruzeiros had an equivalent value in U. S. currency of approximately $1,110.00 in 1960, of approximately $745.00 in 1961, and, at the time of the judgment below $170.00. A court may take judicial notice of the value of the money of a foreign nation in terms of that of the U. S. in making a judgment. See Hunter v. New York O. & W. R. Co., 116 N.Y. 615, 23 N.E. 9, 6 L.R.A. 246 (1889).

The universal rule of municipal law of Conflict of Laws acknowledges an exception to the mandatory reference to lex loci delicti when enforcement of that law would contravene the public policy of the jurisdiction where enforcement is sought; Goodrich, supra, Sec. 11. It is equally basic, however, that differences between the law of the forum and the law of the place of injury must be extraordinary in character. A differing rule of the forum does not of itself constitute a statement of a divergent public policy justifying a departure from the general rule;

Lewis v. Reconstruction Finance Corp., supra; and the public policy exception to the general rule is applicable only when the foreign law violates a fundamental principle of justice; Cardozo, J., in Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918). Within recent months the New York Court of Appeals invoked the exception in Kilberg v. N.E. Airlines, Inc., 9 N.Y. 2d 34, 211 N.Y. Supp. 2d 133, 172 N.E. 2d 526 (1961), a celebrated case in which the Court held inapplicable the damage limitation of the Massachusetts Wrongful Death Statute to an action grounded thereon in a New York court for the death of a New York resident in a crash occurring in Massachusetts on an interstate flight. Finding that territorial jurisdiction in interstate flights is "entirely fortuitous", that arbitrary damage limitations upon actions for wrongful death are "unfair and anachronistic treatment" of air transportation disasters, and that there existed a public policy of New York which is "strong, clear and old", to protect New York citizens against such limitations, the Court applied the unlimited measure of damages under the New York Statute as a "procedural or remedial question controlled by our own state policy." 172 N.E. 2d at 527-529. The public policy applied in Kilberg found its statement in a provision of long standing of the New York Constitution expressly prohibiting any statutory limitation in amount of the right to recover for injuries resulting in death.

The defendant Varig Airlines contends that, not only is there no public policy of the District of Columbia to which enforcement of the monetary limits of recovery under Article 102 of the Brazilian Aeronautical Code would be inimical, but, on the contrary, the declared public policy of the District is such as to require its enforcement. No Constitutional prescription of damage limitations has, of course, ever existed in the District of Columbia; moreover, until 1948, the District of Columbia Statute itself imposed a maximum $10,000.00 limit on damages for wrongful death, and, even as amended by the Act of June 19, 1948, reserved power in both the trial court and Court of Appeals to reduce an excessive verdict, whether above or below the former limitation.

The legislative policy of the District, therefore, unlike that of New York, has historically been receptive to limitation of wrongful death damages in general, and this Court has implemented the policy by strict construction of the statute with respect to the elements of damage intended to be included therein. See Ciarrocchi v. James Kane Co., 116 F. Supp. 848 (1953). The policy is manifest in the specific context of international air transportation, moreover, by the terms of Article 22 of the Warsaw Convention of 1929, which limits the liability for negligence of a "carrier" to its passenger, in the absence of agreement to the contrary, to a maximum sum of 125,000 francs, or approximately $8,300.00. 49 Stat. 3000; Rhyne, Aviation Accident Law (1947), pages 252 through 254.

There is yet another policy of the United States, and a fortiori of the District of Columbia, of deference to the legislation of the foreign sovereign, as an expression of its public policy, whenever practicable, in the interest of international comity. The Federal Aviation Act of 1958, Sec. 1102, declares that neither the Administrator of the Federal Aviation Agency nor the Civil Aeronautics Board shall "restrict compliance by any (American) air carrier with any obligation, duty or liability imposed by any foreign country . . ." 49 U.S.C.A., Sec. 1502. The U. S.-Brazilian Air Transport Agreement of October, 1946, declares, by Article V, paragraph 1, that "the laws and regulations of one Contracting Party relative to the entry into its own territory, or a departure therefrom of aircraft employed in the international air navigation or to the operation of such aircraft within its own territory, shall be applied to the aircraft of the airline or airlines of the other Contracting Party", 61 Stat. at 4128. Although both the Air Transport Agreement and the Chicago Convention are, by their terms, applicable only to "civil aircraft" and not to "state aircraft" (including military aircraft), the tenor of both agreements is of deference to the legislation of the territorial sovereign. Article 3 of the Chicago Convention prohibits penetration by the "state aircraft" of one state of the air space of another, except by authorization by "special agreement" and in accordance therewith,

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61 Stat. at 1181. It is, therefore, clear that the positive public policy to be implemented by this Court is of: (1) Enforcement of limitations upon damages recoverable for wrongful death imposed by the appropriate legislative authority in its exercise of judgment with respect to the party who should bear the risk of loss for fatalities in commercial aviation; (2) Deference to the legislation of a foreign sovereign in the interest of international comity when practicable.

In Lauritzen v. Larsen, 345 U.S. 571, 97 L. Ed. 1254 (1953), Larsen, a Danish seaman, signed aboard a Danish vessel in New York Harbor and was subsequently injured by the shipowner's negligence while the vessel was in Cuban territorial waters. Declining to accept the administrative remedy afforded him under Danish law, which fixed maximum limits upon compensation and disallowed an award for pain and suffering, Larsen sued the shipowner, Lauritzen, in the District Court for the Southern District of New York in an action under the Jones Act, 46 U.S.C.A., Sec. 688. In reversing a substantial verdict for plaintiff on the ground that Congress did not intend the universal language of the Jones Act to permit the common law remedy in an action of tort to apply to events having such tenuous territorial contacts with the U. S., the Court, per Jackson, J., said:

> "Respondent places great stress upon the assertion that petitioner's commerce and contacts with the ports of the United States are frequent and regular, as the basis for applying our Statute to incidents aboard his ships. But the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea." 345 U.S. at 581, 97 L. Ed. at 1267.

And with particular reference to plaintiff's assertion that lex fori should determine his remedy, the Court said, 345 U.S. at 590-591, 97 L. Ed. at 1272:

"It is urged that, since an American forum has perfected its jurisdiction over the parties and defendant does more or less frequent and regular business within the forum state, it should apply its own law to the controversy between them. The 'doing business' which is enough to warrant service of process may fall quite short of the considerations necessary to bring extra-territorial torts to judgment under our law. Under respondent's contention, all that is necessary to bring a foreign transaction between foreigners in foreign ports under American law is to be able to serve American process on the defendant. We have held it a denial of due process of law when a State of the Union attempts to draw into control of its law otherwise foreign controversies, on slight connections, because it is a forum state. . . The purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum. Jurisdiction of maritime cases in all countries is so wide, and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable."

Lauritzen v. Larsen has ascertained and applied the public policy of the United States in the context of the law applicable to maritime torts committed by aliens aboard alien vessels in foreign territorial waters. No relevant distinction exists between a maritime and an aeronautical medium insofar as it affects the appropriateness of an extension of American tort law to govern the consequences of extra-territorial events. Brazilian law corresponds to American law insofar as it applies the law of the locus delicti to govern obligations arising from tortious conduct; Law of Introduction to the Civil Code, Article 9.

The First Circuit has pointed the way to the ideal solution:

"In developing the body of rules governing choice of law problems, the ideal in view is the recognition, by common consent of the states and nations having civilized systems of law, of a proper substantive law of the transaction at hand, to be uniformly applied regardless of the forum in which the litigation happens to be instituted. No doubt this ideal cannot be fully realized without the aid of international convention. But measurable advances have

> been made; and further progress to that end is possible if courts would not be too predisposed to apply the law of the forum with which they are of course most familiar, instead of candidly examining to see whether the transaction as a whole, in its more important aspects, is not centered in some other jurisdiction, whose law would therefore more appropriately be selected as the applicable law." (Jansson v. Swedish American Line, 185 F.2d 212, 219)

There the Court held Swedish law applicable to determine whether "the tort liability which was created by Swedish law January 3, 1947 [the date of the accident] bore an inherent characteristic or condition subsequent whereby such liability would be extinguished by lapse of a year without the filing of suit" (185 F.2d 220). In so holding, the Court observed:

> "The only factual elements bearing any relation to the United States are that the passenger happened to be an American citizen and that the voyage in question was to terminate at an American port. These seem to us wholly incidental factors in a transaction which as a whole was predominantly of Swedish concern." (Id. at 220)

The Supreme Court last year refused to extend United States labor law to foreign flag ships where a fleet was operating in a regular course of trade between foreign ports and the United States and the foreign owner of the ships is in turn owned by an American corporation. The Court said:

> "But to follow such a suggested procedure to the ultimate might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports. Such activity would raise considerable disturbance not only in the field of maritime law but in our international relations as well." (McCulloch v. Sociedad Nacional, Etc., 372 U.S. 10, 19, 83 S. Ct. 671, 676 (1963))

III.

Public Policy Does Not Require the Reversal of the District Court

A. Kilberg Has Not Changed the Law Applicable to This Case

Appellant's Brief claims Kilberg is leading the way to new interpretations and is representative of the more recent decisions. But, (a) Kilberg's facts were different than those here, (b) no sovereign power was involved and (c) the case has not been followed in other recent cases. In the Kilberg case the facts were that:

(a) The decedent was a resident of New York.

(b) He bought a ticket in New York (La Guardia Airport) for transportation to Nantucket, Massachusetts.[1]

(c) Most of the flight was conducted over New York.

(d) The accident occurred at Nantucket. (172 N.E. 2d 527)

Here the facts are completely dissimilar:

(a) Decedents were military personnel traveling on an itinerant military aircraft.

(b) Their itinerary took them over a number of foreign countries having differing legal systems, some of which also have limitations of liability.

(c) Decedents had no contract with appellee's ticket offices in the District or in the United States.

(d) There is no showing whether any part of decedents' flight touched the District.

(e) The REAL aircraft was on a regularly scheduled flight between cities in the State of Minas Gerias less than an hour apart.

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[1] In cases involving maritime torts, courts have given considerable weight to the place of purchase of the ticket. Caruso v. Italian Line, 184 F.S. 862.

In Kilberg, the legal system of a sovereign country was not involved.

Under these circumstances, the holding of Kilberg that the place of the accident was fortuitous and should not regulate the measure of damages is not applicable. This Navy aircraft was out of the United States and traversed the airspace of many different foreign countries with legal systems differing from that of the United States. The decedents were not under the protection of the Warsaw Convention since they were on a military aircraft. Their situation was not similar to that of a commercial passenger traveling between United States cities.

Kilberg has not been followed in the Pennsylvania Supreme Court. Two parallel cases have arisen involving accidents in the Province of Ontario, Canada to residents of Pennsylvania and New York. The law of Ontario provides that the driver of a vehicle "shall not be liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in" the vehicle (Highway Traffic Act of Ontario, Sec. 50). In the Babcock case cited by appellant, the New York Court stated:

> "The present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed and undoubtedly insured in New York, in the course of a weekend journey which began and was to end there. In sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there. . . Ontario has no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario by reason of conduct which was tortious under Ontario law." (191 N.E. 2d 284)

But in Bednarowicz v. Petrone, 400 Pa. 385, 162 A.2d 687 (1960) where both the plaintiff and defendant were residents of Pennsylvania driving in Ontario where the accident occurred, the Pennsylvania Court held:

"The constitution of the United States is the supreme law of this land, but neither the Pennsylvania Constitution nor the Federal Constitution have extra territorial force and effect so far as a tort in another country is concerned. [citing cases]. Plaintiffs argue that since Pennsylvania recognizes a right of action for an accident occuring in this state by the negligence or wanton negligence of the defendant, any law in a foreign country which has such a right or remedy is contrary to Pennsylvania public policy and Pennsylvania law and should not be recognized or enforced in Pennsylvania. The instant case does not involve or bar or abolish a right or even a remedy which Pennsylvanians possess. Plaintiffs possess no right or cause of action in the state (Ontario) where the accident occurred, and therefore are not deprived of a right or remedy by our courts since no right or cause of action ever existed in them, or under the law of Ontario * * *. Our decisions on the question of conflict of laws are irreconcilable with those recognized by some Canadian courts and are directly in point and adverse to the Plaintiffs." (162 A.2d 689, 690)

Bednarowicz has been followed by the Third Circuit in a case involving a Pennsylvania resident injured in California. It held:

"The right of the plaintiff to maintain a common law action and the liability of the defendant were governed by the law of California, the place of the wrong and the consequential injuries." (307 F.2d 721, 724 (1962))

The Sixth Circuit has followed the same rule. After referring to Kilberg and noting that the "dictum in Kilberg would undoubtedly be applied by the courts in the State of New York", the Court held:

"Ohio recognizes the application of the principle of 'lex loci delicti' in wrongful death cases. Ellis, Admx v. Garwood, 168 Ohio St. 241, 152 N.E. 2d 100 (1958). The measure of damages is governed by the law of the place where the accident occurred. Louisville & N. Rd. Co. v. Greene, Admx., 133 Ohio St. 546, 149 N.E. 876 (1925); Alexander v. Pennsylvania Co., 48 Ohio St. 623, 636, 30 N.E. 69; Weiser, Admr. v. Smith, 73 Ohio App. 380, 56 N.E. 2d 522; Ford Motor Co. v. Barry, 30 Ohio App. 528, 165 N.E. 865; Louisville & N. Rd. Co. v. Greene, Admx., 26 Ohio App. 392, 160 N.E. 495. See also: Duskin v. Pennsylvania-Central Airlines Corp., 167 F.2d 727, 732 (C.A. 6).

"To our knowledge, Ohio has not adopted the New York dictum. Until the Ohio courts have spoken on the subject we must follow the law as it is. We should not attempt to make new law for the state in conflict with its existing decisions." (Goranson v. Kloeb, 380 F.2d 655, 656 (1962))

While Babcock is an extension of the law, it does no violence to international law since both Plaintiff and Defendant were residents of New York. Had the Defendant been a citizen of Ontario and had the court reached the same result, then, and only then, the holding would have been significant for appellant.

The latest draft of the Restatement does not support appellant's claim of change in the law. The Introductory Note on page 2 of Tentative Draft No. 8 dated April 15, 1963 reads:

"2. Present Approach

"The principal changes are (a) that torts are now said to be governed by the local law of the state which has the most significant relationship with the occurrence and with the parties and (b) that separate rules are stated for different kinds of torts."

In the discussion, the Draft states:

"When the injury occurs in a single, clearly ascertainable state and when the conduct which caused the injury also occurred there, the local law of this state will almost invariably govern." (p. 5)

American Jurisprudence Second Edition, Volume 8 published in 1963 states at page 739:

"The provisions of the Warsaw Convention supersede the usual doctrine that the right and measure of recovery for injuries are governed by the lex loci and not the lex fori . . ." (Aviation, Par. 109)

Appellant has presented the Workmen's Compensation cases[1] as examples of the "new" approach claimed to be shown by Kilberg. These

[1] Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 52 S.Ct. 571 (1932); Alaska Packers Assn v. Industrial Acc. Comm., 294 U.S. 532, 55 S.Ct. 518 (1935); Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U.S. 493, 59 S.Ct. 629 (1939); Carroll v. Lanza, 349 U.S. 408, 75 S.Ct. 804 (1955).

cases concern a highly specialized problem – what law governs, the place of injury or the place of payment of premiums – and provide no precedent for reversing the District Court's holding here where we have decisions by the Supreme Court and this Court in cases which cannot be distinguished on any significant issue of fact or law from the case at bar.

The appellant's reference to the Clay case is misleading (Brief, p. 28). Justice Black's dissent reads:

> "The only philosophy on which the Dick and Delta & Pine Land Co. cases could be made to apply here would be on the old idea that the law of the place where the contract is made always governs every activity under it, a rule that had been repudiated by courts and commentators everywhere, especially as a constitutional rule." (36 U.S. 207, 220; 80A S.Ct. 1222, 1230)

The problem faced by the Court in the Clay case and in Watson v. Employers Liability Assurance Company, 348 U.S. 66, 75 S.Ct. 166, was whether States could establish requirements for insurance policies purchased by residents from companies in other states. Actually in the Watson case the Court held that the place of the injury governed:

> "We have already pointed to the vital interests of Louisiana in liability insurance that covers injuries to people in that State. Of course Massachusetts also has some interest in the policy sued on in this case. The insurance contract was formally executed in that State and Gilletee has an office there. But plainly these interests cannot outweigh the interest of Louisiana in taking care of those injuried in Louisiana. Since this is true, the Full Faith and Credit Clause does not compel Louisiana to subordinate its direct action provisions to Massachusetts contract rules." (348 U.S. 73, 75 S.Ct. 170)

The Richards case upon which appellant relies so heavily turns on the construction of the phrase "the law of the place where the act or omission occurred" in the Federal Tort Claims Act (369 U.S. 8, 82 S.Ct. 585, 590 (1962)).

Lauritzen is still the leading case in this area. The Supreme Court five years later said: "Thus the reasoning of Lauritzen v. Larsen governs all claims here." (Romero v. International Terminal Operating Co., 79 S.Ct. 468, 465, 358 U.S. 354, 382). Last year, the District Court in Jullienn v. Steamship Marseille followed Lauritzen and stated:

> "The fact of possible witnesses in New Orleans cannot outweigh the Supreme Court's concern for making a foreign corporation respond to the variety of laws with which it comes in contact solely because of its international operations." (214 F. Supp. 770, 772)

See also Koukorinis v. S/T Eurypyle, 214 F. Supp. 344, 347.

B. United States Public Policy Does Not Require That Brazilian Law Be Ignored

Appellant claims the use of Brazilian law would be against public policy of the District. She claims to do so would "shock . . . our sense of justice" and would cause us to "feel the pricks of conscience."

The facts here are that a United States military aircraft collided with a REAL aircraft on a regular scheduled flight as a result of which the aircraft was destroyed and the passengers killed. But neither REAL nor the representatives of the passengers have any action against the United States. The Federal Tort Claims Act excludes "any claim arising in a foreign country." (28 U.S.C.A. 2680(k)) Residents of foreign countries have no recourse against the United States for injuries or death caused by its negligence taking place outside the United States. Whether it is an unlighted crane on a highway in Okinawa (Cobb v. U.S., 191 F.2d 604; cert. den. 342 U.S. 913) or the negligent operation of an airplane in Brazil, there is no recovery.

If it should be decided that both of the aircraft were at fault and impossible to establish the proportion of culpability then half the recovery would be denied the representatives of the victims. See Article 130 of the Brazilian Code of the Air (page 7 of Appellant's Brief).

Brazil's law treats foreigners the same as its own citizens in the event of injury or death within its borders. The law governing compensation for death arising from "illicit" acts provides for payment of the decedent's medical and funeral expenses, the costs of the family's "mourning outfit" and in furnishing "support to the persons to whom the deceased owed it." The impossibility of interchanging parts of the legal system, of Brazil and that of the United States, was shown by the Supreme Court in the Slater case where it found that the common law court did not have the power to make an award under a similar statement. An award of support "analogous to a decree for alimony" was expressly declared beyond the power of the common law court in an action for wrongful death in Slater v. Mexican National Railroad, supra, 194 U.S. at 128, 48 L.Ed. at 903. Slater was, insofar as it holds periodic payments for wrongful death to be unenforceable, most recently cited with approval in Williams v. Green Bay and Western Railroad Co., 326 U.S. at 556, footnote 7, 90 L. Ed. at 316, footnote 7.

Appellant is proposing a sort of preeminence for United States citizens extraterritorially as though we were living in the days of the Roman or British Empires. The policy advocated by appellant is more private than public.

While the cases cited by appellant mention public policy they are inapposite here. We have cited the Cuba Railroad case as reaffirming Slater. Of course, the doctrine that courts will not enforce contract provisions contrary to public policy is well settled. The Clapper (Bradford Electric Light Co. v. Clapper, 286 U.S. 145) and Pacific (Pacific Employer Ins. Co. v. Industrial Accident Com., 306 U.S. 493) cases involve the extraterritorial effect of workmen's compensation statutes. They hold that the state in which the accident occurs will follow the state of residence if the result is not obnoxious to its policy; where it would be obnoxious the state of residence applies its own laws. The Griffin case (Griffin v. McCoach, 313 U.S. 498) decides that before a difference amounts to a policy question rather than a mere difference

in laws, there must be something substantial, e.g., "a public policy which protects citizens against the assumed dangers of insurance on their lives held by strangers" (p. 507). In Loughran v. Loughran, 292 U.S. 216, the only language on page 227 which is remotely connected with these problems reads:

> "It may, in the exercise of the police power, prohibit the enjoyment by persons within its borders of many rights acquired elsewhere and refuse to lend the aid of its courts to enforce them."

Lewis v. Reconstruction Finance Corporation, 177 F.2d 654, is about as close as the Loughran case. There the Court held an action brought in the District under the wrongful death act of Nebraska was not governed by the District's wrongful death statute since it is limited to death resulting from injuries in the District (p. 656).

Northern Pacific Rd. Co. v. Babcock, 154 U.S. 190, 14 S.Ct. 978, says nothing which could be remotely construed as holding that a court is justified in ignoring a foreign damage limitation that would be prejudicial to the general interest of our own citizens. The phrase quoted (Appellant's Brief, p. 21) is from a decision of the Minnesota Supreme Court. The entire paragraph conveys a different impression:

> "But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the lex loci contractus and the lex fori are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state wherever made. To justify a court in refusing to enforce a right of action which accrued under the law of another it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens. If the state of Iowa sees fit to impose this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens." (14 S.Ct. 981)

Not one of the cases cited by appellant on public policy is relevant to the holding the Court is asked to make here. The sentences and bits of sentences picked out of cases are woven into the brief without consideration as to the holding in each of the cases.

United States courts cannot be expected to apply their concept of public policy to actions arising in other sovereign nations. The number of foreign laws and actions that could be found contrary to our public policy are probably infinite. Even in dealing with what appear to be unlawful acts of a sovereign, our courts have been reluctant to characterize acts as unlawful or against public policy:

> "For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." (American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S.Ct. 511, 512).[1]

Appellant's repetitive assertions of $170 are not persuasive. The representatives of the band members at least have some remedy whereas the representations of the passengers have none against the United States. The band must have been in South America for some purpose – undoubtedly to enhance the image of the United States. The public policy of the United States should look toward the achievement of such purpose. The satisfaction of appellant's claim highlighting the vastly different treatment accorded United States victims and Brazilian victims of the same accident would defeat such a purpose. Public policy could be better realized by a recognition through appropriate action of the mission on which the band members were dispatched and their contribution to this mission. So far as public policy preventing its citizens from becoming incapable of self support, this would not be controlling since

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[1] In Steele v. Bulova Watch Co., 344 U.S. 280, 73 S.Ct. 252, the Court in referring to this case said: "This court agreed that a violation of American laws could not be grounded on a foreign nation's sovereign acts" (p. 288).

the allowances made by the military are already made up by the public. So far as the argument that Brazil is just impecunious and their law should be ignored, it should be recognized that the impact on the economy of the resignation of President Quadros and the elevation of Vice President Goulart accellerated a surge of inflation which was almost catastrophic. It cannot be assumed that the limitations never had a sensible basis and therefore should not be followed.

IV.

Even if Article 102 of the Brazilian Aeronautical Code Is Refused Application to Limit Maximum Recovery, Article 1537 of the Brazilian Civil Code Declares the General Remedy for Wrongful Death To Be an Award of Support to the Decedent's Survivors, a Remedy Unenforceable by This Court, or the Court Below.

Chapter 2 of the Civil Code of Brazil, entitled, "Of the Liquidation of Obligations Arising from Illicit Acts," declares by Article 1537 that the indemnity for homicide consists of the payment of the decedent's medical and funeral expenses, the cost of the family's "mourning outfit," and "in the furnishing of support to the persons to whom the deceased owed it." Civil Code of January, 1916, (1961 Ed.). An award of support "analogous to a decree for alimony" was expressly declared beyond the power of the common law court in an action for wrongful death in Slater v. Mexican National Railroad, supra, 194 U.S. at 128, 48 L.Ed. at 903. Slater was, insofar as it holds periodic payments for wrongful death to be unenforceable, most recently cited with approval in Williams v. Green Bay and Western Railroad Co., 326 U.S. at 556, footnote 7, 90 L.Ed. at 316, footnote 7. Appellee submits that the principle precludes an award to appellant of a remedy under general Brazilian law for the death of her decedent not limited by the provisions of Article 102 of the Aeronautical Code. Consequently, this Court obtains no jurisdiction of appellant's claim by Title 11, Sec. 306, District of Columbia Code (1961 Ed.).

CONCLUSION

To apply the rationale of Kilberg to the instant case, which arises upon facts occurring almost a year prior to the Kilberg decision, would subject Varig Airlines to a liability of which it had no forewarning, either in its own law or the law of the jurisdiction in which it is sought to be held. To apply a rule of damages of the American forum to an aerial collision in Brazilian air space between an American military aircraft and a Brazilian airliner on a wholly intra-national flight, solely on the connection of the nationality of the victim and the acquisition of local service, would not only place an extraordinary burden on international comity but also subvert the objective of uniformity sought by the rules of Conflict of Laws. Such a result would permit damages to be assessed by as many different measures as there are jurisdictions in which the defendant does business or in which prospective plaintiffs or plaintiffs' decedents reside.

Respectfully submitted,

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APPELLANT'S REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,277

BEATRICE ANTONETTE TRAMONTANA,

Appellant,

v.

S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE, a Brazilian Corporation, t/a VARIG AIRLINES,

Appellee.

Appeal From the United States District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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INDEX

TABLE OF CITATIONS

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v.

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RIO GRANDENSE, a Brazilian Corporation, t/a
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Appeal From the United States District Court
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APPELLANT'S REPLY BRIEF

Appellant files this Reply Brief in response to certain contentions advanced in the Brief for Appellee.

I.

The Public Policy of the District of Columbia Precludes Enforcement of the Brazilian Limitation of Damages in the Amount of $170

That the District of Columbia has a policy of permitting substantial damages for wrongful death, free of any arbitrary legislative limitation, is not seriously questioned by Appellee. That policy is embodied

in the District's Wrongful Death Act, 16 D. C. Code § 1201 (1961 ed.), a policy which permits what this Court has described as "substantial damages". Rankin v. Shayne Brothers, Inc., 98 U.S. App. D.C. 214, 215, 234 F.2d 35, 36.

The fact that this suit, involving an injury or happening outside the District which resulted in death, cannot be brought under the District Wrongful Death Act does not render the policy inapplicable or irrelevant. In the celebrated Kilberg case, the relevant New York policy as to unlimited damage recovery was found in New York constitutional provisions which is no way formed any part of the cause of action springing from the Massachusetts law. And so here, to the extent that the source of Appellee's obligation to compensate Appellant for wrongful death injuries is dependent on the law of Brazil, pertinent District policies that may condition or expand the enforcement of that obligation must necessarily arise out of statutes or other considerations not directly involved in establishing the cause of action.

The District's policy authorizing substantial damages for wrongful deaths is uninhibited, of course, by any statutory limitation. The Congressional removal in 1948 of the previous $10,000 limitation fully illustrates the unrestricted nature of this policy. Appellee's attempt (Brief, pp. 8-9) to distinguish the District policy in this respect from that of New York, as expounded in the Kilberg case, is fruitless. However much the District policy may have "historically been receptive to limitation of wrongful death damages," since 1948 that receptiveness has been non-existent. And the fact that the unlimited nature of that policy has been expressed in the District by legislative action rather than by constitutional provision as in New York is without significance. The District, having no constitution of its own, can only express its policies through legislative provision or judicial interpretation.

Thus the parallel between the District and the New York policies is complete. This common policy is one that abhors any arbitrary limitation on wrongful death recoveries, particularly one that has a $170

ceiling. While it is true, as Appellee states (Brief, p. 7), that a differing rule of the forum does not of itself constitute a statement of a divergent public policy justifying a departure from the lex loci delicti commissi principle, there comes a point where a differing rule of the forum is so divergent from that of the foreign jurisdiction as to require enforcement of the forum's policy. That point is certainly reached, Appellant submits, when a $170 limitation is sought to be imposed on a damage action brought in the District of Columbia. If a $15,000 limitation was thought in the Kilberg case to be inconsistent with the New York policy of unlimited recovery, even more inconsistent is a $170 limitation in light of the identical District policy.[1]

Appellee does not dispute the public policy exception to the traditional lex loci delicti commissi principle. And none of the classic cases cited by Appellee as expressive of that principle denies such an exception; nor did they involve the type of grossly inconsistent policies here at stake. See Slater v. Mexican National R. Co., 194 U.S. 120; Cuba Railroad Co. v. Crosby, 222 U.S. 473.[2] What is involved here is a comparison between a policy of unlimited and substantial recovery and a policy limiting recovery to a pittance of $170. The mere statement of that comparison is enough to justify the conclusion that the discrepancy

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[1] Even if the $10,000 limitation in effect in the District prior to 1948 were still the policy, a $170 limitation is so inconsistent with a $10,000 ceiling as to be unenforceable. In other words, $170 is so completely obnoxious as a measure of maximum damages in a wrongful death action in any American jurisdiction, with or without a statutory limitation, as to be considered unenforceable.

[2] The Slater case held that a federal district court in Texas had no jurisdiction to enforce a wrongful death action created by Mexican law where the only damages recoverable under that law were in the nature of alimony or periodic pension payments--which a federal court could not award. The Cuba case merely held that proof of the foreign law, upon which an action depends, is prerequisite to a recovery.

In the instant case, however, there is no dispute as to the right to recover damages under Brazilian law in the amount of $170. The question thus is whether such a limitation is enforceable in the District, where the same type of damage awards can be made in unlimited amounts.

is so great as to warrant the District's refusal to enforce Brazil's $170 limitation.

II.

A Comparison of the Interests of the District of Columbia and of Brazil in the Award of Damages In This Case Justifies Application of the District's Policy of Unlimited Recovery

Appellee seeks to go against the tide of the new developments in the law of conflicts by reiteration of the traditional lex loci delicti commissi concept as to damages. But as Professor Reese, Reporter of the Restatement (Second) of the Conflict of Laws, has recently pointed out,[3]

> "Conflict of laws is in a state of flux. This is particularly true of that most difficult area of the subject, which is frequently referred to as choice of law. Many fundamental rules in this area, that once were generally accepted, have been proved wrong by recent experience. Some of the remaining rules are being subjected to increasing criticism and doubt. More disconcerting is the fact that wide differences presently exist with respect to underlying objectives and values. The suggestion has even been made that all choice-of-law rules should be abandoned. This surely is a time for soul-searching and re-evaluation."[4]

Or, as Chief Judge Sobeloff has remarked, "The applicable rules for a conflicts law of torts have constantly changed in the ceaseless search for a just and fair solution of the problem."

One of the primary targets of this continuing re-evaluation has been the blind adherence to the mechanistic application of the lex loci concept -- the concept relied upon by Appellee and epitomized by the

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[3] Reese, Conflict of Laws and the Restatement Second, 28 Law and Contemp. Prob. 679 (1963).

[4] Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mutual Life Ins. Co., 319 F.2d 469, 473 (C.A. 4).

older Supreme Court decisions.[5] One commentator[6] has said that the concept has little to commend it save "the meager virtue of relative simplicity" which permits "a nasty problem" to be solved "without the travail of thought", a virtue "possessed also by the rule of alphabetical order."

Emerging from this critique has been a growing judicial recognition that it is more reasonable "to avoid a rigid rule and to pursue instead a more flexible approach which would allow the court in each case to inquire which state has the most significant relationships with the events constituting the alleged tort and with the parties. The relative weight due particular factors will vary from case to case, and the court must judge the totality of contacts of the states concerned with the parties and the subject matter. Having thus determined which state has the most significant relationships, the court then will apply the law of that jurisdiction." Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mutual Life Ins. Co., 319 F.2d 469, 473 (C.A. 4).

Authoritative approval of this new decisional trend has been given by the Supreme Court in the series of cases referred to in Appellant's Main Brief, pp. 23-26. The factual and statutory distinctions sought to be drawn by Appellee (Brief, pp. 16-17) do not negative the force of the Supreme Court's explicit and repeated recognition that federal and state courts are free in multi-state tort situations "to take into account the interests of the State having significant contact with the parties to the litigation" and thus to reject the older lex loci dogmas. Richards v. United States, 369 U.S. 1, 12.

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[5] See Slater v. Mexican National R. Co., 194 U.S. 120; Cuba Railroad Co. v. Crosby, 222 U.S. 473. Both of those cases, as well as other judicial references to the lex loci rule, are heavily relied upon by the Appellee (Brief, pp. 5-6).

[6] Currie, The Disinterested Third State, 28 Law and Contemp. Prob. 754, 776 (1963).

Indeed, the Supreme Court decision so heavily relied upon by Appellee (Brief, pp. 10-11, 18), Lauritzen v. Larsen, 345 U.S. 571, actually confirms and applies this more flexible, non-mechanistic approach. The Court there recognized, 345 U.S. at 582-583, that at least three nations had connecting factors with the maritime tort in issue and thereupon proceeded to "review the several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim, particularly a maritime tort claim, and the weight and significance accorded them." Then, after reviewing at least seven distinct factors and concepts -- including the relationships arising under the lex loci delicti commissi principle -- the Court concluded that there was "an overwhelming preponderance in favor of Danish law" on the basis of the law of the flag concept. 345 U.S. at 592. Thereby rejected, in the circumstances of that case, was a mechanistic application of the lex loci rule.[7]

Certain state courts, particularly those of New York and California, have been in the forefront of this mounting judicial trend. It is a trend not to be denied by Appellee's references (Brief, pp. 14-16) to decisions that have maintained allegiance to the lex loci approach.[8] The important fact is that there is a trend away from the arbitrary lex loci rules by those courts that have engaged in what Chief Judge Sobeloff has called "the ceaseless search for a just and fair solution" of these perplexing choice-of-law problems. And it is a trend that the latest draft of the Restatement (Second) of the Conflict of Laws has expressly recognized. Section 379 of the Tentative Draft No. 8, dated April 15, 1963, and referred to by Appellee (Brief, p. 16), states the preferable general principles as follows:

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7 See Noel v. Airponents, Inc., 169 F. Supp. 348 (D.C.N.J.), recognizing and applying the flexible approach of the Lauritzen case and rejecting any "slavish adherence" to any one of the various maritime law concepts.

8 Appellee's citation (Brief, pp. 14-15) of Bednarowicz v. Petrone, 400 Pa. 385, 162 A.2d 687, for example, merely reveals a case where a court insisted, on the basis of its own precedents, upon the lex loci rules. Appellee's remark (Brief, p. 14) that the New York decision in Kilberg "has not been followed in the Pennsylvania Supreme Court" in Bednarowicz is explainable by reference to the fact that Bednarowicz was decided more than six months prior to the Kilberg case.

"(1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort.

"(2) Important contacts that the forum will consider in determining the state of most significant relationship include:

(a) the place where the injury occurred,

(b) the place where the conduct occurred,

(c) the domicil, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

"(3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort and the relative purposes of the tort rules involved."

Hence the decision in a particular case as to the law to be applied as to any given issue should, under this new approach, depend upon the rule of the jurisdiction which has "the most significant relationship" with that issue. This requires a court, as indicated in Lauritzen v. Larsen, 345 U.S. at 583, to review the several factors which may be involved and to accord proper "weight and significance" to them in choosing the governing law.[9]

The choice to be made, the factors to be reviewed, and the relationships to be examined will, of course, vary from case to case. Tort cases are necessarily unique in their circumstances. Thus Appellee's mechanical comparison (Brief, p. 13) of the facts involved in the Kilberg case with those involved in the instant case does not answer the instant

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[9] In Van Dusen v. Barrack, 376 U.S. ___, fn 24, decided March 30, 1964, the Supreme Court intimated no view concerning a contention in that case that, contrary to the view adopted by the Second Circuit in Pearson v. Northeast Airlines, 309 F.2d 553, which followed the Kilberg case, the Full Faith and Credit Clause required Pennsylvania courts to follow all the terms of the Massachusetts Wrongful Death Act, including its limitation of recovery.

problem of choice-of-law as to the recoverable damages.[10] The problem, rather, is to compare the significant relationships and contacts of the respective jurisdictions with reference to the issue involved in the case at bar.

Such a comparison, Appellant reiterates, compels the conclusion that the District rather than the Brazilian rule as to maximum damages should apply. That conclusion is to be drawn from the unique circumstances of this case, circumstances which indicate the fortuitous nature of the Brazilian locale of the accident. This was not the usual one-aircraft type of tragedy, where contractual and other contracts between the decedents and the carrier would likely be evident. Rather it was a collision between two aircraft, only one of which was Brazilian. Brazil's contacts and relationships with the American military plane on which Appellant's husband was a passenger were completely absent, apartfrom the chance fact that the collision occurred over Brazilian territory. Whatever concern may be said to have arisen concerning the losses suffered as a consequence of the deaths of the Navy Bandsmen was certainly not that of Brazil.

The District of Columbia, however, had a real concern with those on board the American military transport plane and with their survivors. It had a concern with those passengers who had resided in the District or whose employment as Navy Bandsmen was centered in the District. And it had a basic concern with seeing to it that their survivors were adequately compensated for their grievous losses. In this situation, invocation of the District's policy as to substantial, unlimited recoveries

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[10] Appellee's claim that Kilberg did not involve sovereign powers is without merit. Both New York and Massachusetts were in a real sense competing sovereign powers in that case, seeking enforcement of their respective policies. Moreover, the Full Faith and Credit Clause, to the extent applicable, forces one State to recognize the laws and policies of another State as if it were a sovereign power. And whereas in Kilberg there was thus an arguable constitutional basis for requiring an application of the lex loci rule, there is no such arguable compulsion on the District of Columbia to apply Brazilian law.

is fully justified even though the tort occurred in a foreign land -- at least where the foreign limitation on recovery is so completely inadequate in terms of the District's legitimate concerns and is so fully at war with the District's own policy as to recovery.

Moreover, the fact that Appellee does business within the District warrants application of the forum's policy where a collision occurs between the Appellee's plane and another carrying District residents and domiciliaries. The District has an interest in seeing to it that those who do business in the District are held to a high degree of care, enforceable through substantial tort recoveries, particularly where the business transacted -- the selling of tickets for flights to and over Brazil -- renders foreseeable the risk of injury by air accident in Brazil. No rational reason presents itself for concluding that such a corporation should be able to inflict death upon District domiciliaries and other American citizens at the paltry penalty of $170 per individual.

Significantly, Appellee presents no substantial interest on the part of Brazil for insisting upon application of its $170 limitation. Brazil concededly recognizes liability and a cause of action in these circumstances. But its damage limitation has not been shown to be anything more than a parochial concern with Brazilian residents, for whom a maximum recovery of 100,000 cruzeiros was thought to be adequate. Not one syllable of legislative language or intent can be marshalled to indicate Brazil's concern with the maximum recoverable by an American citizen suing a Brazilian corporation in an American court, relative to a death occurring while the decedent was aboard an American plane.

In fact, so completely inadequate is a $170 recovering in the American context that it is fair to assume that the Brazilian legislature simply did not think or intend that such a limitation would be applicable in these circumstances. The rapidly fluctuating nature of foreign exchange rates, graphically illustrated by Appellee's reference (Brief, p. 7) to the fall in the value of 100,000 cruzeiros from $1,110 in 1960 to

$745 in 1961 to $170 at the time of the judgment below, demonstrates the total inappropriateness of a damage limitation that has no fixed meaning in American dollars. Brazil's limitation is in no way connected with any standard valuation, such as the 125,000 gold Poincare francs to which the Warsaw Convention limitation is tied. It is simply an amount of cruzeiros deemed adequate to compensate Brazilian residents for wrongful death damages.

That Brazil may well not have intended the limitation imposed by the judgment below is further indicated by Appellee's references (Brief, pp. 19, 22) to provisions of the Brazilian Civil Code which, according to the Appellee, permits a Brazilian resident in a wrongful death situation to obtain additional compensation for the support owed by the deceased. Assuming that such support compensation would not be recoverable in a federal court in the United States under the principle announced in Slater v. Mexican National R. Co., 194 U.S. 120, it would seem apparent that the $170 limitation imposed by Article 102 of the Brazilian Code of the Air is but a segment in a larger pattern of compensation available to Brazilian residents whose breadwinners have been killed. The unenforceability in this jurisdiction of the Brazilian support award provisions, however, does not negate the conceded enforceability of the wrongful death cause of action recognized by Article 97 of the Brazilian Code of the Air. What is thus highlighted is the inappropriateness of following the $170 limitation where American citizens are concerned. Brazil, in short, does not seem to confine even its own citizens to 100,000 cruzeiros. How then can it be said to have intended to force such a limitation on American citizens -- given a recognition by Brazil of a cause of action for wrongful death?

This availability to Brazilian residents of additional compensation beyond the 100,000 cruzeiro limitation completely dissipates any fears expressed by Appellee (Brief, pp. 9, 21, 23) that Brazil might resent application of the District's unlimited recovery policy in these circumstances or that international comity might thereby be burdened

unduly. One of the major factors in a wrongful death recovery in the District is reimbursement to the survivors of the pecuniary assistance or support of which they have been deprived. Tate v. Nelson, 71 F. Supp. 465, 468 (D.C.D.C.). If Appellee is right in its reading of the Brazilian Civil Code, the support award recoverable thereunder coincides precisely with the support compensation available in a District wrongful death action. To permit such recovery in accordance with the District policy would thus further, not impede, Brazilian policy. And international comity would be enhanced rather than harmed.

Appellee's conjecture (Brief, p. 18) that it might be decided that both aircraft were at fault in the instant case and that Brazilian victims would then have no recourse against the United States for the negligent operation of the military plane is premature. The issue here is not one of determining joint negligence or of resolving any question of sovereign immunity from suit. It is simply a question of determining what are the upper limits of damage recovery against a Brazilian corporation for a cause of action recognized by the Brazilian Code of the Air.

Finally, Appellee's reference (Brief, p. 22) to Brazil's accelerated "surge of inflation which was almost catastrophic" cannot serve as a reason for following the rapidly falling value of the cruzeiro with reference to the maximum recoverable in this action. Such inflation, such downward spiralling of the value of Brazilian currency, only emphasizes the inadequacy and the inappropriateness of utilizing the ephemeral rate of exchange as a basis for limiting tort recovery.

From any standpoint, the issue of maximum recovery in these circumstances should be governed by the unlimited policy followed by the District of Columbia courts.

CONCLUSION

For these various reasons, supplementing those expressed in Appellant's Main Brief, the judgment below limiting recovery to $170 should be reversed.

Respectfully submitted,

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APPELLANT'S PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,277

BEATRICE ANTONETTE TRAMONTANA,

Appellant,

v.

S.A. EMPRESA DE VIACAO AEREA
RIO GRANDENSE, a Brazilian Corporation, t/a
VARIG AIRLINES,

Appellee.

Appeal From the United States District Court
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APPELLANT'S PETITION FOR REHEARING EN BANC

Appellant hereby petitions this Court en banc for a rehearing and reconsideration of the opinion and judgment rendered on June 10, 1965, by a panel of the Court composed of Circuit Judges Fahy, Danaher and McGowan, the latter writing the opinion for the Court. 1/

1/ On timely motion by appellant, the Chief Judge ordered that the time for filing this petition for rehearing be extended to and including July 16, 1965.

As the opinion noted (slip opinion, pp. 1-2), this appeal "presents an international variant of a recurring domestic conflict of laws problem, namely, the applicability in the forum (the District of Columbia) of a monetary damage limitation contained in the wrongful death statute of the place of injury (Brazil)." In short, this Court has held that the Brazilian limitation of 100,000 cruzeiros —— or $170 in American money —— is applicable in a wrongful death action brought in the District of Columbia by a Maryland resident.[2/] The District of Columbia was found to have insufficient interest in the amount recoverable by this Maryland resident to warrant invocation of the unlimited recovery policy of the District. And it was said that Maryland, which concededly had a substantial interest by virtue of the residence therein of both the decedent and his widow, would doubtless have applied the Brazilian limitation rather than its own unlimited liability policy had the suit been brought in Maryland. Hence the District of Columbia court would be unjustified in applying anything but the Brazilian limitation of $170 on the value of a human life wrongfully destroyed.

2/ Suit was brought in the District of Columbia under what is now 11 D.C. Code §521(a), conferring jurisdiction on the District Court of "all cases in law and equity between parties, both or either of which shall be resident or be found within said district."

The importance of the issues and the rulings thereon, from the standpoint of appropriateness of a rehearing en banc, cannot be overemphasized. The decision at the very least represents a major departure from the lex loci delicti commissi principle previously followed in the District of Columbia, the principle that the right of recovery and the amount of damages recoverable for a tort necessarily depend upon the law of the foreign state in which the tort occurred. See Giddings v. Zellan, 82 U.S. App. D.C. 92,93, 160 F. 2d 585, 586. The Court has in effect substituted the newer choice of law principle suggested by appellant, i.e., that the choice of law to be applied to each legal issue presented is to be made by reference to the substantive law of the jurisdiction possessing the strongest interest in or contact with the resolution of that issue. See, e.g., Babcock v. Jackson, 12 N.Y. 2d 473, 191 N.E. 2d 279; Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A. 2d 796.

But in thus rejecting the lex loci conceptualism and adopting the newer and more realistic approach to this conflicts problem, the panel that decided this case has created what appellant believes to be legal and constitutional problems of monumental proportions. So significant are those

problems that this Court, sitting en banc, should consider them before the decision is accorded finality. As these problems are now cast, their consideration by the entire Court becomes most appropriate as a prelude to possible review by the Supreme Court. See Pearson v. Northeast Airlines, Inc., 307 F. 2d 131 (C.A.2); reversed on en banc reconsideration, 309 F. 2d 553 (C.A.2); certiorari denied, 372 U.S. 912.[3/]

Moreover, the issues decided by the panel and the constitutional consequences flowing therefrom relate, for the most part, to matters which were not urged, explored or argued by either counsel in this case. While the panel had undoubted power to determine these matters as it did without the benefit of counsel, rehearing en banc becomes most appropriate in order to allow full consideration by counsel of these significant issues. One of "the ordinary rules respecting appeals" is that "all parties to the record . . . must be given

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3/ The Pearson case involved vital problems under the Full Faith and Credit Clause as to the power of New York to ignore a Massachusetts limitation of $15,000 on the amount recoverable for a wrongful death, the accident having occurred in Massachusetts. Rehearing en banc was granted because the issue decided by the panel was of "great significance — the constitutional power of the states to develop conflict of laws doctrine." 309 F. 2d at 555. As it turned out, that issue was decided wrongly by the panel.

an opportunity to be heard on such appeal." Davis v. Mercantile Trust Co., 152 U.S. 590, 593.

The factors which make the requested rehearing both appropriate and necessary may be stated as follows:

1. The Error as to the Lack of the District's Relationship to the Matter in Issue.

Preliminarily, one significant factor — as to which appellant was fully heard — deserves reconsideration if for no other reason than as a means of avoiding the more critical constitutional and legal problems (as to which appellant was not heard) stemming from the decision as rendered. That factor is the ruling (slip opinion, p. 18) "that the only relationship of the District of Columbia to this claim is that it provides a forum with jurisdiction over the appellee." That relationship was said to be so tenuous and remote as to constitute no ground for preferring the District's unlimited liability policy over the limited policy of Brazil.

Appellant has no quarrel, of course, with the process of comparing the respective interests of the District and Brazil regarding the issue of recoverable damages. But it has never been appellant's position that the District's interest was solely "that of forum qua forum" (see slip opinion, p. 17). Nor can the District's concern fairly be limited that narrowly.

That concern, in other words, rests on considerations far more significant than the mere fact that the appellee, by virtue of having an office in the District, is subject to suit here.

While the appellant and her deceased husband were residents of Maryland at the time of the fatal accident and while appellant was technically designated in the complaint below as residing in Maryland,[4/] the District's intimate concern and connection with the accident and with the amount recoverable for the wrongful death are very substantial. The District, as the home of the Federal Government, has a close relationship to federal employees working in the District, including those who reside in the surrounding Maryland and Virginia suburbs. Cf. Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469, 476. And the most recent formulation of the Restatement of Conflict of Laws, §379(2)(c), quoted by the Court at p. 17 of its opinion, makes the "place of business of the parties" a relevant factor to consider in weighing the interests of the District in this regard. Indeed, at least as to those federal employees whose employment is centered here, the District may be said to represent the national concern with their welfare for purposes of

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4/ Appellant was identified in the complaint(J.A.1) as residing c/o Mr. Vincent Cozzolino, 1613 Dayton Road, West Hyattsville, Maryland. Actually, although the record does not so indicate, appellant is, and for the past several years has been, a resident of the state of New York.

dealing with torts committed against them on foreign soil while in pursuit of their official duties. Does not the national interest, as reflected by a federal court in the District of Columbia, concern itself with the availability of meaningful recovery for the wrongful death of a federal employee? What national interest is served, in relation to a foreign tort, by making the substantiality of recovery turn upon the particular American state in which the District-oriented federal employee resided at the time of his death?

That the appellant's husband was a federal employee whose employment was centered in the District is beyond dispute. This Court has recognized (slip opinion, p. 2) that at the time of death he "was a member of the United States Navy Band, which was on an official tour of Latin America." And in Armiger v. United States, 339 F. 2d 652 (Ct. Cl.), twice referred to by this Court (slip opinion, p. 4, fn. 3; p. 12, fn. 13), 5/

5/ The Armiger case was a Congressional reference matter totally unrelated to the instant wrongful death action. This Court's statement at p. 12, fn.13, that the burden of appellant's support, should she be unable to support herself, "has, by reason of the action of Congress and the Court of Claims, been assumed to some degree by the entire United States" is premature if not inaccurate. The Court of Claims in the Armiger case recommended to the Congress that, based on its conclusion that the United States was equitably obligated under the facts there involved, each estate of the deceased bandsmen should be paid $25,000. Bills to implement that recommendation have been introduced in both the House and Senate (see H.R. 5912 and S. 1503, 89th Cong., 1st Sess.), but the bills have yet to clear their respective committees. The Department of the Navy has voiced strong objection to the passage of the bills and there is no assurance at this writing that they will be enacted.

the findings of fact incorporated in that opinion .(339 F. 2d at 633) made that fact even clearer:

1. The United States Navy Band, as such, has been in existence since 1918 and is stationed at the Sail Loft of the Navy Yard in Washington, D. C. Finding 3.

2. The functions of the Band include participating at official United States Government occasions, presenting concerts in the City of Washington, and participating in public events outside the District of a national or international character. Finding 4.

3. Each deceased member of the Band was at the time of the fatal collision "a Regular Navy enlisted man serving on active duty in the Regular Navy under a Regular Navy enlistment of from four to six years, with a rating of Musician." Finding 6. As such, each member of the Band was subject to military orders and regulations of general application in the Naval branch of the Armed Forces, just like other Navy personnel. Finding 7.

4. The military and administrative control of the Band members is in the hands of the Commanding Officer, U.S. Naval Station, Washington, D.C. Finding 5.

5. The Band is permanently stationed in Washington, D. C. and is a professional, cohesive unit whose members are normally not rotated. Finding 7(b).

6. The South American tour, on which the fatal accident occurred, both began and ended in Washington, D. C. Finding 24.

Certainly the District would appear to have a concern with a tort wrongfully inflicted upon such a member of the Armed Forces, a member whose work and duty were centralized in the District. The nature of the metropolitan area of Washington, with its constant residential interchanges, makes it unrealistic to make sharp or decisive distinctions on the basis of one's residence within that area at any given time. One's work within the District can create ties so strong that one's survivors may well move to the District; and their residence in Maryland may thus be temporary. This Court's prediction (slip opinion, p. 11) that "If appellant and her children should ever become public charges, the burden will rest not on the District of Columbia but on the citizens of Maryland, where appellant resides" simply ignores the potentials of modern metropolitan mobility. It ill-behooves the District to refuse a substantial recovery to the survivors of a District worker on the theory that the relief rolls of a suburban Maryland community rather than those of the District should or will bear the ultimate burden.

The District, moreover, has a real concern with the degree of tort liability to be imposed on a foreign corporation like the appellee, which is authorized to do business in the District with all who enter its doors. A concern that such a corporation be held to the same degree of tort liability as other corporations doing business in the District, thereby insuring

some degree of safety precautions for the benefit of those in the District who do business with the corporation, is a legitimate and recognizable one.

But it is the national or federal interest which should be of paramount importance in a tragic case of this nature. The whole thesis of this Court's opinion is premised upon a distinction, for purposes of weighing the non-Brazilian interests, between residence in the District and residence in Maryland. Since appellant did not reside in the District she is not entitled to the benefit of the District's unlimited liability policy, which would otherwise be available to her because of the District's concern with District residents. And because she is a Maryland resident, which gives Maryland a "not insignificant" interest in the matter of her recovery (p. 12), she is held bound by the Maryland conflicts rule as to recovery.

When 18 members of the Armed Forces, permanently stationed in the District, are killed simultaneously in a foreign land, however, all such distinctions between the American residences of the deceased and their survivors lose significance. Those distinctions then serve only to beget discriminations if allowed to be the determinant of who can recover $170 only and who can recover an unlimited amount for the wrongful deaths. A federal court in the District of Columbia should not lend itself to the perpetuation of such discriminations.

This, then, is a case where, as a matter of federal or national interest, a uniform treatment should be accorded the survivors of the deceased servicemen. From the standpoint of this broad American interest, why should any state or jurisdiction within the United States be forced to support the survivors of these servicemen because of a Brazilian concern with limiting the liability of its airline industry to $170 per death? Such a Brazilian interest, unrelated as it is to the financial needs and well-being of the American survivors, should not be permitted recognition in these circumstances. It is the kind of an interest, particularly since it results in an almost total lack of protection to the victims of the tortious conduct, that has no recognizable counterpart in any part of American law. No state, no jurisdiction in the United States, confines recovery for a wrongful death to such an absurdly low figure as $170.

The concern of Brazil, commented on at length by this Court, stems from the fact that the accident occurred in Brazil and involved a Brazilian airliner. But when the accident also involves a United States Navy plane carrying American servicemen, whose survivors are American citizens who may be forced on the relief rolls of any number of American states, there is an American national interest to be weighed against that of Brazil. And when that weighing occurs in the context of a suit in an American court having conceded jurisdiction

over the parties, appellant submits that as a matter of federal law the American interest in the accident should prevail. The law of the forum, the unlimited liability policy of the District, should therefore be applied.

Residence of the plaintiff, as this Court has indicated, can create a sufficient interest under the new choice of law doctrine to justify invoking the tort recovery policy of the place of residence. Here the place of residence was the United States, in contrast to the locus of the accident in Brazil. And under the principles now recognized by this Court, such American residence should be enough to justify ignoring the unreasonable and unconscionable limitation of $170 placed on wrongful death recoveries by Brazil. No principle of international comity, federal law or domestic policy dictates any other result.

2. The Error as to the Choice of Maryland Law

The basic legal error in the result reached by this Court is revealed in the question put at page 15 of the slip opinion:

> "And if a Maryland court would not disregard Brazilian law for the benefit of one of its own residents in a suit brought there, why should a court sitting in the District of Columbia do so at the expense of substantial and legitimate interests of Brazil?"

The Court conceded (slip opinion, p. 11) that appellant made no suggestion that the law of Maryland should

be applied to determine the issue in this case.[6] But the Court nonetheless made the Maryland law decisive, because of the Maryland residence of appellant and her late husband, and concluded that the $170 Brazilian limitation on recovery would have been applied if this action had been brought originally in Maryland.

This conclusion, based upon an issue and an analysis as to which none of the parties has been heard, is so significant in the resolution of this case that a rehearing should be granted so that the parties' contentions may be brought to bear on the matter. Standing alone, the invocation of the Maryland conflicts law in this setting appears to be so inconsistent with the choice of law principle recognized by this Court as to constitute a most confusing element in the development of that principle.

What the selection of the Maryland conflicts rule means in this case is a reincarnation of the generally discredited "renvoi" doctrine.[7] Under the new choice of law doctrine utilized by this Court, a balance was struck between the asserted interests of Brazil and the District of Columbia with respect to the issue of recoverable damages. The panel felt that, as between those two jurisdictions, Brazil clearly had the greater interest so as to justify imposing Brazil's substantive rule limiting recovery to $170 in American money. The District's interest was said to

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6/ See footnote 9, infra, p. 15.
7/ "The doctrine of renvoi has generally been repudiated by the American authorities." 16 Am. Jur. 2d, Conflict of Laws, §2.

be too slight to warrant use of its substantive rule of unlimited liability.

The Court then turned to what it felt was the decisive element in the case arising from the fact that appellant and her husband were Maryland residents. That fact, said the Court (slip opinion, p. 12), made it necessary to strike a balance "as between the law of Maryland and the law of Brazil." Noting that the interests of Brazil "remains unchanged" in this balancing, the opinion declares (p. 12) that the residence in Maryland makes Maryland's "interest in the matter of appellant's recovery . . . not insignificant, for it is on the citizens of Maryland that the burden of her support, if she is unable to support herself, is likely to fall in the first instance."

The stage was thus set for invoking the Maryland substantive law as to wrongful death damages, assuming Maryland's interest by virtue of appellant's residence was sufficient to overcome Brazil's interest. That law or policy of Maryland, embodied in Article 67, §4, Ann. Code of Md. (1957), provides that

> ". . . in every such [wrongful death] action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought. . ."

Under this Maryland policy, "the general rule is that substantial damages may be awarded in any death case in which the plaintiff

prevails." Snyder v. United States, 118 F. Supp. 585, 593 (D. Md.).[8] Recognition of the Maryland unlimited liability policy, which is identical to that of the District of Columbia, would thus have led to the conclusion that appellant was entitled to the benefits of that policy.[9]

But the Court ignored this Maryland substantive policy and instead turned to the Maryland conflicts rule whereby "it appears likely that a Maryland court would not have ignored the Brazilian limitation on recovery if this action had been brought there originally" (slip opinion, p. 12). In so doing, however, the Court created a "renvoi" situation whereby the whole law of Maryland — particularly the conflicts law — was chosen to determine the impact of Maryland's asserted concern with the issue of recoverable damages. The difficulties with this choice of law are manifold:

1. The choice of law principle enunciated by this

8/ In discussing the Maryland law as to unlimited or substantial damages, the court in the Snyder case, 118 F. Supp. at 593, referred to the identical District of Columbia policy as set forth in Hord v. National Homeopathic Hospital, 102 F. Supp. 792 (D.C.D.C.), affirmed, 92 U.S. App. D. C. 204, 204 F. 2d 397, relied upon by appellant in her main brief to this Court (pp. 9, 17, 18).

9/ It was an awareness by appellant's counsel that Maryland had an unlimited recovery policy identical to that of the District that made it unnecessary to elaborate as to the applicability or inapplicability of the Maryland law in this area. Cf. footnote 12, p. 11, of slip opinion. As was stated at p. 12 of appellant's main brief, "permitting them [the non-District residents] to recover amounts in excess of the $170 Brazilian limitation would be in accord with the policies of the states in which they reside."

Court and reflected in the Restatement rule, §379, quoted at page 17 of the opinion, is premised upon selecting the "local law of the state which has the most significant relationship with the occurrence and with the parties." And by "local law" is meant that state's substantive law dealing with the issue in question rather than "the totality of its laws including its Conflict of Laws rules." Restatement (Second), Conflict of Laws (Tent. Draft No. 9, 1964), §379, Comment h, p. 13. "Values of certainty of result and of ease of application," in the words of that Comment, "dictate that the forum should apply the local law of the selected state and not concern itself with the complications that might arise if effect were to be given to that state's Conflict of Laws rules. There is also no basis for supposing that fairness requires the forum to give effect to the Conflict of Laws rules of the selected state. To the extent that they may give thought to the possible consequences before engaging in conduct which may be tortious, persons would probably expect that the local law of the state selected by application of the present rule would be applied." Indeed, so basic to the effectuation of the newer choice of law principle is the choice of a state's substantive rather than its conflicts rule that no thought has been given to amending or changing the original Restatement rule, §7(b), promulgated in 1934, that

> ". . . where in making the choice of law to govern a certain situation the law of another state is to be applied, since the only Conflict of Laws used in the

> determination of the case is the Conflict of Laws of the forum, the foreign law to be applied is the law applicable to the matter at hand and not the Conflict of Laws of the foreign state."

2. To refer to Maryland's conflict rules rather than to Maryland's substantive law of recoverable damages is to invoke the ghost of "renvoi" —— the idea "that the result of the suit ought to be the same [in the forum court] as it would be if the suit were brought in the state whose law the [forum] court originally chose." Stimson, Conflict of Laws 77 (1963).[10/]

While there may be situations where the "renvoi" doctrine is acceptable, see Griswold, Renvoi Revisited, 51 Harv. L. Rev. 1165 (1938), the instant situation is assuredly not one of them. In this case, the District Court below clearly had jurisdiction to determine the applicable recovery rule. See Stewart v. Baltimore & Ohio R. Co., 168 U.S. 445, 448. And this Court has determined that the applicable rule is that of the state or jurisdiction having the greatest concern or relationship with the problem of recoverable damages.

10/ The highly questionable renvoi theory, as thus expressed, is precisely the analysis used by the court in Gore v. Northeast Airlines, Inc., 222 F. Supp. 50, 54 (S.D.N.Y.), discussed and relied upon by this Court at p. 16 of the slip opinion. The court in Gore said that had the plaintiff there sued in a New York court the suit "would be considered by that court to be a relatively 'fortuitous' circumstance; and that it would not subordinate the interests of Massachusetts in order to afford the widow and children of this decedent better treatment than they would receive from the courts of their own state [California or Maryland] which was freely chosen as their domicile long before this suit was commenced."

The conflicts law of the District of Columbia, in other words, is one of searching for the jurisdiction with the most concern or contact with the matter in issue. Once that choice has been made, the problem is simply one of applying to the District of Columbia suit the substantive law of the jurisdiction with the prevailing interest. If Brazil's interest prevails, the 100,000 cruzeiro limitation applies; but if either Maryland or the District of Columbia has the greater interest, the unlimited recovery policy of those jurisdictions should apply.

The conflicts of law rule of either Brazil or Maryland has no relevance in this setting since such a rule is unrelated to the interests of those jurisdictions in the amount recoverable in this case. Thus to insist upon treating with the Maryland conflicts rule is an unwarranted use of the "renvoi" doctrine. 11/

3. The unsatisfactory nature of the "renvoi" doctrine in this case is underscored by the uncertainty and guesswork which must accompany a determination of the Maryland conflicts rule. Maryland simply has not had occasion to determine whether it would follow the newer concepts of choice of laws or the older lex loci principles as to the amount of damages recoverable.

11/ It was in this type of case that the Wisconsin court expressly rejected the renvoi doctrine and adhered to "the well recognized principle of conflict of laws that, where the substantive law of another state is applied, there necessarily must be excluded such foreign state's law of conflict of laws." Haumschild v. Continental Casualty Co., 7 Wis. 2d 130, 95 N.W. 2d 814, 820.

As a result, this Court is forced to speculate that Maryland courts would choose the latter — stating (slip opinion, pp. 14-15) that Section 2 of the Maryland wrongful death statute "suggests strongly" and gives "no reason for us to suppose that the Maryland courts would refuse to follow" the older approach as to the amount of damages recoverable.

But why should it be assumed, if Maryland has a "not insubstantial" interest in the welfare of its residents, that Maryland would not want that interest reflected in a suit brought by a Maryland resident in a District of Columbia court, at least where that court is free to discard the lex loci principles and concentrate solely on the practical interests involved? Must it be supposed that, confronted with a $170 Brazilian limitation in a suit brought in Maryland, a Maryland court would be less sensitive than a District of Columbia court to Maryland's "not insubstantial" interest in the welfare of its own residents? 12/

Pragmatically speaking, if Maryland were to recognize its substantial interest in permitting appellant to secure a meaningful recovery so as to save her from becoming a public

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12/ "The forum should not blindly follow the choice of law concepts of the state whose law it has chosen. It should think for itself what is the sound choice of law rule." Stimson, Conflict of Laws 77 (1963).

charge it would not recognize a foreign law provision limiting her recovery to $170. Such an amount is totally inadequate as a means of effectuating that state interest. And it is reasonable to assume, therefore, that a Maryland court would interpret or apply §2 of the Maryland wrongful death statute in such a way as to preclude that result. This it could do either by reading into §2 a public policy exception, the Brazilian limitation being wholly contrary to the Maryland policy of unlimited recovery, or by adopting — as this Court has done — an analysis of the respective contacts and concluding that Maryland's interest outweighs that of Brazil. In short, the Maryland statutory rule that foreign law is to be applied in actions on foreign wrongful deaths is not the necessary or conclusive Maryland rule in this extreme type of situation.

Indeed, this Court's assumption that Maryland would not follow its unlimited recovery rule were the suit brought there can only be grounded on the proposition "that no important interest of that state will be infringed by the failure of the court of another state [Maryland] to apply the [substantive] rule in similar circumstances." Restatement (Second), Conflict of Laws (Tent. Draft No. 9, 1964), §379, Comment h, pp. 13-14. But that proposition has already been demolished by this Court by its statement (slip opinion, p. 12) that Maryland does have a "not insignificant" interest at stake, an interest that would obviously be infringed by recognition of the $170 limitation.

Thus the reversion to the "renvoi" doctrine in this case results in an unrealistic and highly tenuous assumption that Maryland would be insensitive to its substantial interest in the amount recoverable by the appellant. Rehearing should therefore be granted in order to examine more fully into the propriety of the use of the renvoi concept in the setting of this case.

3. The Constitutional Questions Created by the Court's Opinion

The inevitable consequence of the Court's resolution of this difficult conflict of laws issue is the creation of several constitutional problems of the first magnitude. Those problems, stemming as they do from the opinion as written, deserve and demand full exploration by this Court. And the respective parties should be given the opportunity to be heard with respect to them.

As appellant views it, the basic thrust of the Court's opinion is directed at the residence of the appellant. Had appellant been a resident of the District of Columbia, the opinion clearly indicates that the District's concern with her welfare as a District resident would suffice to overcome Brazil's interest in limiting recovery; she would therefore be entitled to the benefit of the District's unlimited recovery policy. But since she is a Maryland resident — and solely because she resides in that state — she must be limited to the Brazilian maximum of $170. Whether that Brazilian limitation is applied

to her through the use of "renvoi" or otherwise, the fact remains that appellant's residence outside the District is the decisive element causing her to lose the benefits of an unlimited recovery policy. Not even Maryland's conceded interest in her right to a substantial damage recovery can save her from the fate of a $170 recovery.

Appellant submits that the outer limits of the choice of law principles have been breached and that this Court should now save the case from falling into the abyss of unconstitutional discrimination. Without attempting at this point to delineate them in full, appellant believes that the following constitutional questions inescapably emerge from this Court's decision of June 10:

1. Does the appellant, as a Maryland resident, have a right under the Privileges and Immunities Clause, Art. IV, §2, to bring suit in the District of Columbia for a foreign wrongful death and to obtain the same benefit of the unlimited recovery policy as would be accorded a District plaintiff?

The Supreme Court has held that a state may not, consistently with the Constitution, arbitrarily close the doors of its courts to actions for wrongful deaths occurring in another state. Hughes v. Fetter, 341 U.S. 609; First National Bank v. United Air Lines, 342 U.S. 396. And, having opened the doors of its courts to such actions, a state may not then condition the access on discriminatory terms as between residents and

non-residents of the forum.

This latter principle, which is at stake here, was most pertinently recognized nearly sixty years ago in Chambers v. Baltimore & Ohio R. Co., 207 U.S. 142. In that case, a Pennsylvania resident brought an action in an Ohio court for the wrongful death of her husband in Pennsylvania. An Ohio statute authorized such an action for a foreign wrongful death only when the death was that of a citizen of Ohio. The Supreme Court, viewing the statute as making no discrimination based on the residence of the plaintiff to the suit (as distinguished from the residence of the deceased), affirmed the dismissal of the suit. Mr. Justice Harlan and two others dissented.

The majority in Chambers, however, recognized certain fundamental propositions under the Privileges and Immunities Clause (207 U.S. at 148-149):

> ". . . subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different states may have different policies, and the same state may have different policies, at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land."

Mr. Justice Harlan's dissent, while viewing the impact

of the Ohio statute differently than the majority, expressed much the same constitutional views (207 U.S. at 154-155):

> "It thus appears that the final judgment in this case for the railroad company rests upon the distinct ground that the courts of Ohio cannot, under the statute of that state, take cognizance of an action for damages on account of death occurring in another state and caused by wrongful act, neglect, or default, except where the person wrongfully killed was a citizen of Ohio. In that view, if two persons, one a citizen of Ohio and the other a citizen of Pennsylvania, traveling together on a railroad in Pennsylvania, should both be killed at the same moment and under precisely the same circumstances, in consequence of the negligence or default of the railroad company, the courts of Ohio are closed by its statute against any suit for damages brought by the widow or the estate of the citizen of Pennsylvania against the railroad company, but will be open to suit by the widow or the estate of the deceased citizen of Ohio, although by the laws of the state where the death occurred the widow or estate of each decedent would have, in the latter state, a valid cause of action.
>
> "Is a state enactment having such effect repugnant to the clause of the Federal Constitution, art. 4, §2, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states?" Will not that constitutional guaranty be shorn of much of its value if any state can reserve, either for its own citizens, or for the estates of its citizens, privileges and immunities which, even where the facts are the same, it denies to citizens or to the estates of citizens of other states?
>
> "It is not necessary to fully enumerate the privileges and immunities secured against hostile discrimination by the constitutional provision in question. All agree that among such privileges and immunities are those which, under our institutions, are fundamental in their nature. I cordially assent to what is said upon this point in the opinion just delivered for the majority of the court. The opinion says: 'In the decision of the merits of the case there are some fundamental principles which are of controlling

> effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution. . . The privileges which it [the state] affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land.'"

The applicability of the foregoing principles to this case seems plain. By virtue of this Court's decision of June 10, the District of Columbia, having opened the door of its courts to suits for wrongful death occurring in Brazil and other foreign jurisdictions, has in this instance closed the door to all meaningful relief to a non-resident plaintiff solely because she is a non-resident. The privilege of securing an unlimited amount of recovery has been accorded only to those plaintiffs who reside in the District and for whom the District has a paternal concern. But because the District has no such concern for a non-resident, that plaintiff is barred from any meaningful recovery. The recovery allowable such a plaintiff — $170 — is too miniscule to qualify as a meaningful recovery; for all practical purposes, the door of the District of Columbia court has been shut on this appellant.

That door to effective relief having been shut solely because appellant is a non-District resident, the principles of the Privileges and Immunities Clause come into operation.[13] To be sure, the District is free to adopt a choice of law doctrine which weighs the residence of the plaintiff as one of the factors in assessing the contacts of the forum with the matter in issue. And in given situations, the residential factor may be decisive in resolving the prevailing contact. But in this case the Court has made residence not only the decisive factor vis-a-vis the interest of Brazil in limiting the liability of its airlines but also the sole and decisive factor as between the plaintiffs entitled to take advantage of an unlimited recovery policy and thus avoid the Brazilian limitation. And it has done so in circumstances where the home state of the non-forum plaintiff (Maryland) has an unlimited liability policy identical to that of the forum (the District) and where by use of the "renvoi" doctrine the home state's policy is made inapplicable. The sum total of these rulings is to preclude any kind of effective relief to this appellant solely because she is a non-District

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13/ While that clause technically may not be applicable to the District, the principles therein established must be considered binding upon a District of Columbia court dealing with non-resident plaintiffs. Cf. Bolling v. Sharpe, 347 U.S. 497, 500 ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.").

resident, while allowing a District resident to secure a recovery unbounded by the Brazilian limitation.[14/]

Appellant does not take the position that she has an unqualified constitutional right to the benefits of the District's wrongful death recovery policy. What she does claim is a right under the Privileges and Immunities Clause not to be denied effective access to the District of Columbia courts and to effective relief therein — where the sole and decisive reason therefor is her non-District residence. The unconstitutional discrimination with respect to the effective access of the District of Columbia courts is, in appellant's view, between two types of plaintiffs:

(1) The District resident, whose residency in the District would give the District sufficient contact with the recovery issue to permit recognition of the District's unlimited recovery policy; and

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14/ This unfortunate set of circumstances, which creates the constitutional problem, could be avoided if the Court were to recognize that the District has at least the contacts outlined heretofore (pp. 5-12, supra). Those contacts, combined with Maryland's contact stemming from appellant's residence, would then permit invocation of the identical recovery policies of the District and Maryland on the basis suggested by the Restatement (Second), Conflict of Laws (Tent. Draft No. 9, 1964), §379, Comment i, p. 14:

> "When contacts involving a tort are located in two or more states with identical local law rules on issue in question, the case will be treated for purposes of this Section as if the contacts were grouped in a single state."

(2) The non-District plaintiff who resides in a state where such residency would constitute a sufficient contact with the recovery issue to permit recognition of that state's unlimited recovery policy, a policy identical with that of the District.

In these circumstances, to permit unlimited recovery only to the District plaintiff and to confine the non-District plaintiff to a de minimus recovery is to effectuate a gross and unwarranted discrimination. The Privileges and Immunities Clause of course permits disparity of treatment as between residents and non-residents "where there are perfectly valid independent reasons for it." Toomer v. Witsell, 334 U.S. 385, 396; and see Douglas v. New York, N.H. & H.R.R., 279 U.S. 377, 387. But no such "valid independent reasons" are here apparent. No concept of choice of law or notion of renvoi can justify the disparity effectuated here between a District plaintiff and this Maryland plaintiff.

It has been said, and it bears repeating, that "The fact that a state has no interest in extending the protection of its laws to nonresidents, even if there is added the fact that no declared policy of a sister state will be advanced by extending the protection, is probably not sufficient, in general, to justify a classification excluding citizens of other states. When the benefits of a law are potentially available

to the population of the state in general, and when extension of its benefits to citizens of other states would advance the mutual interests of all states by avoiding the cycle of retaliation and reciprocity, the Constitution requires such extension." Currie and Schreter, Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities, 69 Yale L.J. 1323, 1390-1391 (1960). And see Quong Ham Wah Co. v. Industrial Accident Commission, 184 Cal. 26, 37-38, 192 Pac. 1021, 1026, writ of error dismissed, 255 U.S. 445.

(2) Does the appellant have a right under the Equal Protection Clause of the Fourteenth Amendment, as applied to the District of Columbia, to equality of treatment in this case with a District plaintiff?

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws," a principle which applies with equal force to the District of Columbia. See Bolling v. Sharpe, 347 U.S. 497. And a foreign suitor in the courts of a state for purposes of litigation is clearly a "person within its jurisdiction" so as to be entitled to the equal protection of the laws. Kentucky Finance Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544, 550. Thus the appellant, as a foreign suitor permitted to sue in the District of Columbia courts on a foreign wrongful death action, was entitled to the equal protection of the District's laws in the course of pro-

cessing that action.

For the same reasons set forth with respect to the Privileges and Immunities Clause claim, the discrimination here created as to the appellant because of her non-District residence would appear to violate the principles of the Equal Protection Clause. The nub of this Clause is an insistence upon reasonableness in any discrimination or classification established by a state. But something more than a classification in terms of residence is needed to satisfy that requirement. It is not enough that such a classification coincides with a state's interest in applying its own laws to its own residents or opening its doors to effective relief for its own residents, thereby reflecting a lack of concern with the welfare of an out-of-state suitor. See Currie and Schreter, Unconstitutional Discrimination in the Conflict of Laws: Equal Protection, 28 U. Chi. L. Rev. 1 (1960).

In short, the residence per se of a party plaintiff cannot be recognized as a reasonable basis for classifying who shall receive the benefits of any legal policies of a state — at least where the right to bring suit is unrelated to one's residence. Yet, as has been indicated, appellant has been denied the benefits of an unlimited recovery policy solely because of her non-District residence. That this discrimination was effected through the process of a choice of law doctrine does not make the discrimination any less real or the constitutional problem

any less substantial.

This constitutional problem obviously deserves the full attention and consideration of this Court.

3. Does the Full Faith and Credit Clause require recognition and application of Maryland's unlimited recovery statute and is the appellant denied due process of law under the Fifth Amendment by this Court's failure to recognize and apply that statute?

This Court has held that the District of Columbia has no legitimate interest or contact with the accident or with the issue of recoverable damages. It apparently views the matter solely as one to which Brazil and Maryland have competing claims, the Maryland one being of a "not insubstantial" nature due to the residence therein of the appellant and her late husband. The Court seemingly indicates that this Maryland interest or contact is sufficient enough to overcome the Brazilian interest; otherwise the Court's extensive search into the Maryland law would be meaningless.

As already shown, (pp. 14-15, supra), Maryland has a provision in its wrongful death statute permitting recovery without limitation. That provision would be the pertinent one to reflect Maryland's conceded interest in the matter here involved. Yet through the use of the renvoi doctrine that provision is ignored and its benefits made unavailable to the appellant.

Thus the District of Columbia, which is said to have no interest in the matter, has applied its choice of law doctrine so as to exclude the one provision of Maryland law that mirrors Maryland's prevailing contact. And when the disinterested forum applies its conflicts law in such a way as to defeat substantial rights available under a pertinent law of another state, there is a denial of due process in the constitutional sense. Home Ins. Co. v. Dick, 281 U.S. 397. As the Supreme Court said in the Dick case, p. 410, the forum state "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them."

The substantiality of the due process rights of the appellant that have been abrogated is not to be denied. The failure of this Court to permit appellant to secure the benefits of §4 of the Maryland wrongful death statute means that she is denied all opportunity for meaningful relief against the appellee, being confined to a maximum recovery of $170. Thus appellant and others in her position are left remediless and put in danger of becoming public charges of Maryland — "both matters of grave concern to the state." Alaska Packers Assoc. v. Industrial Accident Comm., 294 U.S. 532, 542.

By the same token, the District's refusal to apply the Maryland provision of law relating to damage recoveries for wrongful death would seem, in these circumstances, to violate the basic purpose of the Full Faith and Credit Clause. By the

Court's ruling, the District has no interest, no statute or no policy at stake here. Its sole concern is to assess the contacts as between Brazil and Maryland and to give full faith and credit to the relevant statute reflecting the prevailing contact or interest. And if Maryland's interest prevails, the relevant Maryland statute would become controlling by force of the Full Faith and Credit Clause. Hughes v. Fetter, 341 U.S. 609.

Thus is put in bold relief not only the incongruity and inequity of the use of the renvoi doctrine in this case but also the constitutional invalidity of such a resort to the doctrine. If the renvoi doctrine results in the denial to the litigant of the right to a substantial recovery which the substantive law of the state of his residence would give him, then the renvoi doctrine must be constitutionally suspect under the Due Process Clause. And if the renvoi concept is used to deny recognition of an otherwise pertinent substantive law of the state of plaintiff's residence, it must also be suspect under the Full Faith and Credit Clause.

Conclusion

In order that the foregoing propositions may be fully heard and resolved by the entire Court and in order that the parties may be fully heard on the important questions

arising from the Court's opinion of June 10, this petition for rehearing en banc should be granted.

Respectfully submitted,

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July 16, 1965

Certificate of Counsel

Counsel for the appellant hereby certify that this petition for rehearing en banc is presented in good faith and not for delay.

Eugene Gressman

APPELLEE'S OPPOSITION TO PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
for the
DISTRICT OF COLUMBIA
Circuit

No. 18,277

BEATRICE ANTONETTE TRAMONTANA,

Appellant,

v.

S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE, a Brazilian Corporation, t/a VARIG AIRLINES,

Appellee.

Appeal From The United States District Court
For The District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 1 1965

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APPELLEE'S OPPOSITION TO PETITION

FOR REHEARING EN BANC

I. THE PANEL CORRECTLY APPLIED CURRENT DOCTRINE TO DETERMINE THE AMOUNT OF APPELLANT'S RECOVERY BY THE LAW OF BRAZIL.

Regarding itself no longer bound by the rule of Slater v. Mexican National Railroad, 194 U.S. 120 (1904), which, whatever its vices, has the virtue of constancy, the panel adopted and correctly employed prevailing theory in the law of conflict of laws. The panel's conclusion, said Judge McGowan,

> "...rests upon an examination of the respective relationships of Brazil and the District of Columbia with the accident, and with the parties here involved; and a consideration of their respective interests in the resolution of this issue." (Opinion, p. 7),

and he proceeded to identify, in the circumstances of Tramontana's death, those facts which the panel thought should affect the choice of law. Not only did cause and effect occur entirely within Brazil, Judge McGowan observed, but abstract considerations of governmental policy favor enforcement of the Brazilian damage limitation. Both aircraft were moving in Brazilian airspace, subject to Brazilian rules of aerial navigation. The alleged negligence and the ensuing death occurred above Brazil. Both pilots has purposefully flown their aircraft to destinations they knew to be in Brazil, and the presence of both planes at the point of impact at the same moment was no fortuity. No hazard of weather or navigational error which they might have anticipated could have caused Tramontana's death elsewhere but in Brazil. The appellee, moreover, is not merely a Brazilian citizen; it is also a national airline, and, as such, receives the benefit of a substantial immunity from liability, conferred by protective legislation enacted by the national legislature to insulate capital investment in the Brazilian aviation industry.

Appellant's preoccupation with the problem of choosing between Maryland and District of Columbia law obscures the fact that it is only her nationality which suggests the possibility of a law other than that of Brazil in the first place. Not until the forum first decides that American law, in at least one of its fifty-one manifestations, shall supersede Brazilian law does it reach the question of which American law is appropriate. Judge McGowan enumerated the contacts with both the District of Columbia and Maryland--the only American jurisdictions which could constitutionally have sought to impress their law upon these events--but found no reason there to displace Brazilian law. Appellant now merely reiterates that the District of Columbia is the jurisdiction in which her decedent's unit had its permanent duty station, and Maryland is the jurisdiction in which they made their home. Each such contact is a matter of practical political concern, she says, even if altruism alone be insufficient reason for this Court to ignore appropriate Brazilian law. But no interest of the District of Columbia is served in applying its measure of damages in wrongful death cases when it is apparent that U. S. military units need no such inducement to locate their permanent duty stations in Washington, D. C. Nor is there anything in the record from which Maryland might apprehend that Mrs. Tramontana will, in fact, become a welfare case, to whose support Maryland would want contribution. And, when widows and children of Maryland decedents are as likely to become a drain upon its public charity whether their kin die in Massachusetts or Brazil, no policy to which Maryland attaches much importance is advanced by refusing to honor a Brazilian damage limitation which a Maryland forum would enforce were it written in the law of Massachusetts.

Sympathy with its own national can be subtle incentive for a court to afford him the benefit of any rule of the forum which will favor him in his dispute with an alien, particularly when it is so easily disguised in lofty language of public policy. But Brazilian courts are similarly solicitous of their own. It is the nature of the problem that there be at least two jurisdictions whose citizens are opposed, and neither jurisdiction wants its citizen to be left destitute by a loss which one must inevitably bear. The rule of decision, therefore, must be of more substance than the desire to protect a compatriot, or the results in such cases will be as parochial as those of earlier centuries. Neither justice nor statesmanship today approves a rule which permits any litigant to avail himself of one rule as plaintiff and another as defendant solely by being countryman to the court.

It would be folly for the Court to allow itself to be led en banc into either consideration of the doctrine of renvoi or constitutional exposition. Those matters are raised only by appellant, not the panel's decision. The doctrine of renvoi is a creature of the "vested rights" conceptualism abandoned in the first part of the panel's opinion, and it thus becomes merely an artifact of the era of the first Restatement. Even by the older learning, however, the doctrine of renvoi would have no application in the context of this case. The "reference back" which the doctrine presupposes simply would not occur. By the rules which it used to follow, a District of Columbia forum would have been obliged to make reference to the law of Brazil, and the law of Brazil would look only within itself for a solution.

Whether or not the United States Constitution compels United States courts to give the citizen of a sister State the benefit of a rule of the forum when the law of his domicile would treat him more harshly, the effect of the panel's decision is not to deny appellant such benefit because she is a foreigner before this Court. The result is not predicated upon her Maryland citizenship, but upon Brazil's comparatively greater interest in the amount of appellant's recovery than either Maryland or the District of Columbia. Appellant concedes that the circumstances of the case were of legitimate governmental concern to all of the jurisdictions involved. The panel, therefore, was free to select the law of that jurisdiction to which, in its judgment, the matter was of greatest concern. See Home Insurance Co. v. Dick, 281 U.S. 397 (1930), and Alaska Packers Association v. Industrial Accident Commission of California, 294 U.S. 532 (1935).

II. SLATER v. MEXICAN NATIONAL RAILROAD COMPELS ENFORCEMENT OF THE BRAZILIAN DAMAGE LIMITATION.

If this Court proposes to re-examine appellant's asserted right to avail herself of such law of the various domestic sub-jurisdictions of the United States as she thinks will be to her advantage, appellee respectfully requests that the Court also reconsider whether it really is, in fact, at liberty to ignore the result in the case of Slater v. Mexican National Railroad, 194 U.S. 120 (1904), even if it disapproves the analysis Slater has come to symbolize. The panel dismissed Slater as an obsolete authority in the law of conflict of laws, Judge McGowan collecting in a footnote certain well-known articles critical of the "vested rights" theory underlying Justice Holmes' opinion in Slater and citing several cases he thought to intimate that the Supreme Court has adopted the innovations proposed by

the academic writers. But no case could be more precisely in point here than Slater, and appellee submits that, until the Supreme Court itself rejects Slater, that case requires the same result here.

Mechanical response to the imagery of a "vested right" has on occasion produced anomalous results when a territorial rule has been applied to parties who never had reason to expect it. But in its time the "vested rights" theory represented impressive social progress. It recognized the existence of a community of civilized nations among whom comity and diplomacy could substitute for force; it produced a uniform result no matter where the forum in which the case was heard; and it permitted the applicable law to be determined with ease, reserving the court's major effort for a consideration of the merits. Even though the concept of a "vested right" fails to provide an analytical method by which every problem of the conflict of laws can be solved with equal facility, a majority of the civilized nations today apply the rule of lex loci to all but the most unusual situations occurring beyond their boundaries. Ehrenzweig, Conflict of Laws, §211, n. 8 (1962); Wolff, Private International Law, §469 (2d ed. 1950); Dicey, Conflict of Laws, p. 933 (7th ed. 1958).

While they may represent a retreat from the absolutism of the Slater opinion, none of the cases cited by Judge McGowan impairs the result it commands in suits in U. S. courts for the death of an American national upon foreign soil. Richards v. United States, 369 U.S. 1 (1962), does no more than construe Congress' meaning with respect to the source of substantive law to be applied under the Federal Tort Claims Act, holding the "whole" law, rather than the "internal" law, of the "place where the act or omission occurred" was intended. The result was to affirm the imposition of the

On the other hand, the Supreme Court has recently taken opportunity to reaffirm the integrity of Slater v. Mexican National Railroad, supra, at least insofar as it represents a rule of decision for cases in tort which involve both American and foreign nationals. In 1949, Mr. Justice Frankfurter said for a majority of the Court, asked to determine which national legislation should define the limits of liability following the collision of a U. S.-owned ship with a British vessel in the territorial waters of Belgium:

> "...(W)e turn to the question whether there are any circumstances under which the Belgian limitation would be enforceable by our courts. On this point we agree...that if, indeed, the Belgian limitation attaches to the right, then nothing in /the Titanic case/ stands in the way of observing that limitation .... (I)f it is the law of Belgium that the wrong creates no greater liability than that recognized by the Convention of 1924, we cannot, without more, regard our own statutes as expanding the right to recover. Any other conclusion would disregard the settled principle that, in the absence of some overriding domestic policy translated into law, the right to recover for a tort depends upon and is measured by the law of the place where the tort occurred." Black Diamond S. S. Corp. v. Stewart & Sons, 336 U.S. 386, 395-396 (1949) (emphasis supplied).

And, most recently, in a case in which a foreign national expressly invoked the protection of its territorial law, in defending against the claim of an American citizen who expected an advantage from the rule of the forum in his own national court, the Supreme Court directed reference to the law of the territorial sovereign to test the propriety of an act committed in another country. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). Ostensibly, the Court ratified the conduct of agents of the Cuban government in confiscating certain American property as an Act of State. The rationale, however, depended upon stamp of legitimacy given the conduct by the Cuban legislation pursuant to which it was done. 376 U.S., 438-439. The Court cited, inter alia,

American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), a decision attributing the same significance to territoriality as Slater in an opinion also written by Mr. Justice Holmes, for almost the same Court which had decided Slater only five years earlier. The effect of the Sabbatino case, therefore, is to reinforce the traditional recognition of the territorial sovereign abroad as the arbiter of the consequences of acts committed within its territory, whatever permissive attitude the Supreme Court intends to take towards the development of conflict of laws doctrine within this Federal Union.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellee's Opposition to Petition for Rehearing En Banc was mailed, postage prepaid, this 1st day of September, 1965, to the following:

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